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# information

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## Summary

Brian E. Stevens, *applicant*, and Ontario Northland Transportation Commission, *employer*.

Board File: 950-295  
CLRB/CCRT Decision no. 1177  
August 9, 1996

These reasons deal with the referral of a number of decisions issued by a Labour Canada safety officer pursuant to section 129(5) of the Canada Labour Code, Part II.

The applicant, an employee of Ontario Northland Railway, invoked his right to refuse unsafe work on two occasions on October 18, 1994. The first work refusal involved an open pit near an assigned work area and the second one involved the use of a varsol solvent that bothered the applicant's hands and eyes, and outdated Material Safety Data Sheets (MSDSs). Other work refusals were invoked by the applicant between October 21 and 24, 1994, again concerning outdated MSDSs. The applicant contends that he also invoked his right to refuse unsafe work for the same reason on October 19, 1994.

## Résumé

Brian E. Stevens, *requérant*, et Ontario Northland Transportation Commission, *employeur*.

Dossier du Conseil: 950-295  
CLRB/CCRT Décision n° 1177  
le 9 août 1996

Les présents motifs portent sur le renvoi devant le Conseil d'un certain nombre de décisions rendues par un agent de sécurité de Travail Canada conformément au paragraphe 129(5) du Code canadien du travail, Partie II.

Le requérant, un employé de Ontario Northland Transportation Commission, a invoqué son droit de refuser un travail dangereux à deux reprises le 18 octobre 1994. Le premier refus avait trait à la présence d'une fosse ouverte à proximité de son poste de travail et le deuxième concernait l'utilisation du solvant Varsol, qui entraînait chez le requérant une réaction cutanée des mains et des yeux, ainsi que des fiches signalétiques périmées. Le requérant a invoqué son droit de refuser un travail dangereux à plusieurs reprises entre le 21 et le 24 octobre 1994, toujours en raison de fiches signalétiques périmées. Le requérant soutient qu'il a aussi invoqué son droit de refuser un travail dangereux le 19 octobre 1994 pour la même raison.





The applicant claims that the safety officer did not properly investigate all invoked work refusals. He further claims that the safety officer did not address the October 19, 1994 work refusal and that his decision dated October 31, 1994 for the October 24, 1994 work refusal does not properly reflect the work refusals that did take place.

The employer raised the issue as to whether the Board had the jurisdiction to deal with this referral. After considering all the relevant facts, the Board concluded that the activities of this employer fell within federal jurisdiction.

The Board had to consider whether a safety officer could interpret the meaning of "days" in section 129(5) to mean working days. The Board also had to consider whether the applicant gave notice requesting the safety officer to refer his decision to this Board in accordance with the provisions of the Code.

The Board found that the safety officer is without authority to extend the meaning of "days" to include working days. The evidence indicates that the applicant's request was not in accordance with the provisions of the Code.

Notwithstanding this finding, the Board commented on the merits of the safety officer's investigation and decision.

Le requérant allègue que l'agent de sécurité n'a pas procédé à une enquête satisfaisante sur tous ses refus d'effectuer un travail dangereux. Il allègue aussi que l'agent de sécurité n'a pas donné suite à son refus de travailler du 19 octobre 1994 et que la décision de l'agent de sécurité datée du 31 octobre 1994 concernant son refus de travailler du 24 octobre 1994 ne tient pas compte des faits ayant véritablement entouré ses refus d'effectuer un travail dangereux ce jour-là.

L'employeur a soulevé une objection contestant la compétence du Conseil pour entendre ce renvoi. Après examen de tous les faits pertinents, le Conseil en est venu à la conclusion que les activités de l'employeur en cause sont de compétence fédérale.

Le Conseil devait établir si un agent de sécurité peut décider que le mot «jour», au sens prévu au paragraphe 129(5), s'entend d'un jour ouvrable. Le Conseil devait aussi établir si le requérant avait dûment avisé l'agent de sécurité de renvoyer sa décision devant le Conseil conformément aux dispositions du Code.

Le Conseil en est venu à la conclusion que l'agent de sécurité n'avait pas le pouvoir requis pour élargir le sens du mot «jour» de façon à inclure les jours ouvrables. La preuve entendue a par ailleurs permis d'établir que la demande du requérant n'était pas conforme aux dispositions du Code.

Nonobstant cette dernière conclusion, le Conseil a formulé des commentaires sur la valeur de de l'enquête et de la décision de l'agent de sécurité.

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Many issues were involved in the applicant's work refusals. Although the actual number of work refusals were unclear, all issues were thoroughly investigated by the Labour Canada safety officer. Considering the particular circumstances of the work refusals, the Board would have found the safety officer's investigation into the issues surrounding the work refusals to have been proper and thorough.

Les refus de travailler du requérant soulevaient de nombreuses questions. Bien qu'il demeure impossible d'établir avec précision le nombre réel de refus de travailler du requérant, toutes les questions soumises à l'attention de l'agent de sécurité de Travail Canada ont fait l'objet d'une enquête exhaustive. Compte tenu des circonstances particulières ayant entouré les refus de travailler, le Conseil en serait donc venu à la conclusion que l'enquête de l'agent de sécurité sur les refus en cause était satisfaisante et exhaustive.





## Reasons for decision

Brian E. Stevens,

*applicant,*

*and*

Ontario Northland Transportation Commission,

*employer.*

Board File: 950-295

CLRB/CCRT Decision no. 1177

August 9, 1996

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The Board was composed of Ms. Mary Rozenberg, Board Member, pursuant to section 156(1) of the Canada Labour Code - Part II. This matter was referred to the Board on November 25, 1994. Following a number of postponements requested by the applicant, a hearing was held on March 20, April 3 and 4, 1995, in Toronto.

These reasons for decision were written by Ms. Mary Rozenberg, Board Member.

### Appearances

Brian Stevens on his own behalf; assisted by George Botic, CAW National Health and Safety Representative.

Ronald Beland, Safety Officer at Human Resources Development Canada; assisted by David Horrox, District Manager, Ontario Region at Human Resources Development Canada.

Murray Rose, Safety Officer at Ontario Northland Railway; assisted by Martin Minor, Supervisor at Ontario Northland Railway.

These reasons deal with the referral to the Board of a number of decisions issued by a Labour Canada safety officer pursuant to section 129(5), Part II of the Canada Labour Code (Occupational Safety and Health), as a result of various work refusals that Mr. Brian Stevens, an employee of Ontario Northland Railway, invoked between October 18 and 24, 1994. The employer and applicant disagree as to the exact dates of the work refusals.

Mr. Stevens claims that the safety officer did not properly investigate all the work refusals, particularly one that had been invoked October 19, 1994.

Section 129(5) of the Canada Labour Code - Part II and other relevant sections provide as follows:

*"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

*"130. (1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

*(a) confirm the decision; or*

*(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*



### Preliminary Matters

A number of matters arose during or prior to the Board's inquiry.

### Board's Jurisdiction

The employer raised the issue as to whether the Board had the jurisdiction to deal with this referral, but then recognized the Board's jurisdiction to deal with the applicant's work refusal.

The matter of who would investigate the work refusal - the Ontario Ministry of Labour or Labour Canada - had been the subject of debate. After some discussion, Labour Canada and the Ontario Ministry of Labour decided that Labour Canada would conduct the investigation under the Canada Labour Code and that two safety officers from the Ontario Ministry of Labour, Doug Billingsley and Wanda Dupras, would also be present. Labour Canada safety officer Ron Beland, accompanied by the Ontario Ministry of Labour safety officers, went to Ontario Northland Railway to conduct an investigation into Mr. Stevens' work refusals on October 28, 1994.

### Decision on Jurisdiction

Matters dealing with wages, working conditions, labour relations and safety at Ontario Northland have been found to fall within the federal jurisdiction. In a 1992 Ontario Labour Relations Board decision (0508-92-OH), the constitutional question arose before that Board in a health and safety matter. The OLRB found that it did not have jurisdiction to consider the matter since the Ontario Occupational Health and Safety Act does not apply to Ontario Northland. Certificates issued by the Canada Labour Relations Board certified the Brotherhood of Railway Carmen of Canada and the CAW-Canada as its successor union pursuant to the Canada Labour Code.

Considering all the relevant facts, the Board concludes that labour relations and safety at Ontario Northland are within federal jurisdiction and that the Board has jurisdiction to deal with the present application.

#### Distribution of Documents

The distribution of documents was also an issue in this matter. There were three components to this aspect of the case.

- 1) The safety officer expressed concern that his personal notes of the work refusal investigation, which he forwarded to the Board, were in the possession of the employer. He indicated that he only distributed official documents to the parties. He was unaware that documents provided to the Board became a matter of public record.
- 2) The applicant raised an objection that the employer had information that he did not have and was placed at a disadvantage.
- 3) A document, unavailable during the hearing, was requested from the applicant to be forwarded to the Board's Toronto Regional Director. The Regional Director forwarded this document to the Board and to the safety officer and employer. Mr. Stevens objected to this and questioned the Regional Director's authority to do this.

The Board made photocopies for the applicant and adjourned for a couple of hours to allow the applicant and his union representative an opportunity to review the documents before proceeding further with the inquiry.

The Board refers Labour Canada safety officers and other parties to Section 18 of the Canada Labour Relations Board Regulations which reads as follows:



*"18. (1) Subject to sections 17 and 25 and subsection 27(2), a person who has received notice of an application under subsection 10(1) and who files a document with the Board in respect of the proceeding shall forthwith serve a copy of that document on all other persons named in the notice that the person has received from the Board in the proceeding.*

*(2) Any person who files a document with the Board in respect of a proceeding shall confirm in writing that a copy is being served on any person named in any notice that the person has received from the Board in the proceeding and shall inform the Board of the time and manner of service."*

(Emphasis added)

All documents filed with the Board are to be distributed by the filing party to all other parties.

### Timeliness

The issue of timeliness was also raised before the Board. There were two components to this question, one dealing with the timeliness of the referral itself, and the other with the Board's jurisdiction to conduct an inquiry under section 130 (1) of the Code.

Mr. Stevens received the safety officer's written decision by fax on Thursday, November 3 and by courier on Friday, November 4, 1994. In a typed letter dated November 8, 1994, Mr. Stevens requested that the safety officer refer his decision to the Board. The envelope that contained this letter bears a Canada Post postmark dated November 16, 1994. This envelope also bears a date stamp as being received by Labour Canada in Sudbury on November 21, 1994.

The safety officer investigated the work refusals on October 28, 1994 and made a verbal finding on that date. In the letter dated November 3, 1994, the safety officer advised Mr. Stevens that "due to the lapsed time, the (7) seven days will be working days".

The questions for the Board to answer are the following:

- 1) Can the safety officer interpret the meaning of days in section 129 (5) to mean working days? Does the Code give the safety officer such authority?
- 2) Did Mr. Stevens give notice in writing within seven days of receiving notice of the decision of the Safety Officer within the meaning of the Code? Is the complaint filed in keeping with the provisions of the Code?

#### Submissions of the Parties on the Timeliness Issues

##### Safety Officer's Submissions

The safety officer acknowledges that he took the liberty of extending the time of 7 days to 7 working days from the day of the verbal decision on October 28, 1994, making November 8, 1994 the time limit. In addition, the Labour Canada Operating Procedures Manual states that all requests for referrals go to the Canada Labour Relations Board regardless of whether or not there are flaws.

##### Applicant's Submissions

According to Mr. Stevens, he indicated verbally to the safety officer on October 28, 1994 that he would request referral of each of the safety officer's decisions. He submits that his obligation was to notify the safety officer, not the Board, of his decision to refer the Board and that he did this verbally on October 28, 1994.

#### Decision on the Timeliness Issues

The timeliness of referrals of safety officer decisions is governed by section 129 (5), Part II of the Code which reads as follows:



*"129.(5) ... the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

(Emphasis added)

The Board must deal with the timeliness issue even if the parties do not raise the issue themselves. Timeliness goes directly to the requirement for the safety officer to refer his decision to the Board. Timeliness also goes directly to the Board's jurisdiction to consider the merits of the application (Rosario Coulombe (1989), 78 di 52 (CLRB no. 747)).

### Calculation of Days

Section 129(5) indicates that the 7-day time limit starts to run once the employee is notified of the safety officer's written decision (Rosario Coulombe, supra; and Adrien Mathon (1990), 82 di 144 (CLRB no. 824)). Furthermore, section 129(5) clearly states that the employee must give notice in writing that he wishes the safety officer to refer his decision to the Board.

The meaning of "days" in section 129(5) was raised in H.D. Snook (1991), 86 di 74 (CLRB no. 895) but not answered. However the meaning of "days" in Part I of the Code is calendar days not working days, and section 122(3) of Part II states:

*"122.(3) Except where otherwise provided in this Part, all other words and expressions have the same meanings as in Part I."*

The Supreme Court of Canada addressed the issue of timeliness in Upper Lakes Shipping v. Sheehan et al., [1979] 1 S.C.R. 902, D.L.R. (3d) 25. The Court stated that the Board could not use its powers under section 16(m) of the Code to vary the time limit provided in section 97(2) of the Code.

Section 8 of the Board's Regulations addresses the date of filing of applications and reads as follows:

*"8. The date of filing of an application, reply, request to intervene or any other document with the Board is*

*a) where the document is sent by registered mail, the date it is mailed; and*

*b) in any other case, the date the document is received by the Board."*

Additionally, the Federal Interpretation Act R.S.C. I-21 provides further guidance for the Board. The computation of time is addressed in sections 26 and 27. These sections reads as follows:

*"26. Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the next day following that is not a holiday."*

*"27.(1) Where there is a reference to a number of clear days on "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded."*

*"27.(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included."*

*"27.(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day."*

*"27.(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day."*

*"27.(5) Where anything is to be done within a time after, from, of, or before a specified day, the time does not include that day,"*

As a general rule, holidays are included in the computation of time. See Pierre-André Côté, *Interpretation of Legislation in Canada* (2nd Ed., Cowansville, Ed. Yvon Blais, 1992, p.78).

The Interpretation Act defines, in section 35, the term "holiday" as meaning Sunday and, in a province, any day that is a non-juridical day by virtue of an Act of the legislature of the province. In Ontario, the Rules of Civil Procedure (R.R.O. 1990, Regulation 194) specify that both Saturday and Sunday are included as "holidays" (rule 1.03).

From all these considerations, the Board concludes that all calendar days, whether or not they be holidays, are to be included in the calculation of the limitation period provided in section 129(5), Part II of the Code.

There is nothing in the Code that authorizes the safety officer to extend the time limit or to give a different interpretation to the meaning of "days". There is also nothing in the Code that allows the Board to extend the time limit or to give a different interpretation to the meaning of "days" referred to in section 129 (5). Nor is there anything in the Board's Regulations to redefine the date upon which a referral request is filed. See section 8 of the Board's Regulations.

Considering the above, the Board concludes that the word "days" contained in section 129(5) Part II has the same meaning as in Part I of the Code. Furthermore, the Board finds that the safety officer is without authority to extend the meaning of days contained in Part II of the Code as it pertains to referral of his decision.

#### Timeliness of Notice

Although the evidence indicates that the applicant composed the request for referral of the safety officer's decision on November 8, 1994 and that he probably intended to mail it on November 9, 1994, the envelope containing the referral request was



postmarked on November 16, 1994. The evidence does not indicate that the referral request was mailed on November 9, 1994, nor can Mr. Stevens provide proof that he did in fact mail it on November 9, 1994.

Because notice was not given within the meaning of section 129(5) of the Code, the safety officer is not required to refer his decision to the Board. The Board also finds that it is without jurisdiction to deal with Mr. Steven's request to refer the safety officer's decision to the Board.

For labour relations reasons, however, the Board will comment on the merits of the safety officer's investigation into the work refusals.

### The Work Refusals

Between October 18, 1994 and October 24, 1994, the complainant invoked his right to refuse unsafe work on a number of occasions.

The first work refusal (October 18, 1994) dealt with an unprotected open maintenance pit that the complainant felt was too close to his work station; as a result of this refusal, the complainant was reassigned to other duties in the Air Brake shop, where he exercised a second work refusal (October 18, 1994) involving the use of a varsol solvent that bothered his hands and eyes, and outdated Material Safety Data Sheets (MSDSs) for thirteen products. As a result of this refusal, Mr. Stevens was again assigned to other duties not involving the use of solvent.

It was determined that some of Mr. Stevens' allegations required further investigation by the joint health and safety committee. On October 19, 1994, the joint Health and Safety Committee conducted an investigation into Mr. Stevens' work refusals, and on October 21, 1994, reconvened to discuss the issues involved in Mr. Stevens' work refusals and the joint investigation.

Mr. Stevens submitted, during the Board's inquiry, that during the investigation conducted on the 19th, he made an additional complaint involving MSD sheets for thirteen products and that he advised Messrs. Minor, Morrison, and Stuart, of this additional complaint. Mr. Minor did not recall a work refusal invoked by Mr. Stevens on October 19, 1994 but he did recall that during a conversation with Mr. Stevens that occurred in the air brake shop, on October 19, Mr. Stevens indicated that he would probably pursue another work refusal. Notes made by Mr. Morrison indicate that a third was in the making regarding the air brake shop.

Since Mr. Stevens' October 18, 1994 work refusal, updated MSDSs had been supplied in the air brake shop work location. Labels were applied to the small vats/decanter and storage containers. Other employees in the air brake shop area were informed that there was a work refusal in progress regarding the products. A portable eyewash unit was available. The joint Health & Safety Committee were working on locations for eyewash stations in the car complex.

Mr. Stevens was asked if he was prepared to go back to work in the air brake shop doing something not involving the use of solvents. Mr. Stevens said he was not prepared to work with any product in the air brake shop that carried an MSD sheet which stated that contact with the product may cause dermatitis or some sort of skin irritation or redness but agreed to other reassigned work.

Mr. Stevens was then assigned to review the MSD sheets for products used in the air brake shop and to flag and report to what extent the book was outdated. On his own initiative, Mr. Stevens also reviewed the MSDS books in the car shop truck room and outside his supervisor's office. Mr. Stevens found other outdated MSDSs, and as a result once again invoked his right to refuse work on October 21, 1994. Union representative Mr. Stuart was advised of this work refusal. Messrs. Minor, Stuart and Stevens went to Mr. Minor's office. At approximately 14:40 hours Mr. Minor called the Ontario Ministry of Labour (OML) and advised them that there were a number of work refusals in progress.

On October 24, 1994 at approximately 08:25 hours, Mr. Stevens approached his supervisor, Bob Coxford and expressed his concerns then stated that he would not return to work or to ONR property until he was satisfied that his health and safety were not at risk. The Joint Committee then decided to contact an inspector from the Ontario Ministry of Labour (OML).

The Ontario Ministry of Labour duty safety officer placed a telephone call to Labour Canada on either October 23 or 24, 1994. Mr. Beland, the Labour Canada designated safety officer for work refusals that occur at Ontario Northland, received the phone message on either October 24 or 25, 1994. Over the next few days Mr. Beland and the Ontario Ministry of Labour were in contact with each other and came to an understanding that Labour Canada would investigate the work refusals at Ontario Northland and that Ontario Ministry of Labour safety officers Doug Billingsley and Wanda Dupras would accompany Mr. Beland. Labour Canada would investigate the work refusals and file a report under Part II of the Canada Labour Code. Ontario Ministry of Labour safety officers were there to offer support and advice in the investigations.

Because of the OML's previous experience with Ontario Northland involving the issue of unprotected open maintenance pits, the emergency aspect of the refusals was considered and discussed as was Mr. Beland's schedule and availability. He was not available until October 28, 1994, and since the safety officers did not consider that this was an emergency situation, it was decided that an investigation into Mr. Stevens' work refusals could be conducted on October 28, 1994.

Arrangements were made for the investigation to commence at 1:00 p.m. The safety officers met the joint Health and Safety Committee members and Mr. Stevens. Mr. Beland requested Mr. Stevens' presence for the investigations. Mr. Stevens refused. After discussion, it was decided to proceed with the investigation of the work refusals in the absence Mr. Stevens. Mr. Beland, Mr. Billingsley and Ms. Dupras examined Mr. Stevens' work area and the maintenance pit #3 area and



then proceeded to the air brake shop. The investigation in the air brake shop included viewing the varsol container bin, the showers in the battery room and the men's room, the eye wash stand, the MSD sheets and the question of explosion-proof ventilation. The employer gave the safety officer a copy of its reports concerning Mr. Stevens' work refusals. After viewing the work locations of the work refusals the group then met with Mr. Stevens and reviewed with him each of the work refusals.

### Open Pit Investigation

The pit was considered to be adequately protected because a car was placed over the pit which covered it.

The OML safety officers stated that they had approved an open pit with yellow markings around it. The Labour Canada safety officer showed the employer a copy of LC decision #93-103 and advised that barricades or covers were needed for the pits and when a car is over the pit, the pit is considered to be covered.

The safety officer advised the employer that barricades or covers were needed for the pits, however, when a car is over the pit, it is covered and not a hazard anymore. The safety officer also commented that it is difficult to conceive an employee backing up 20 feet without looking back at where they were going.

The safety officer's investigation report, dated November 1, 1994 advised "as of the date of investigation, the employer is to comply with section 2.4(2) of the occupational Health and Safety Regulations which states:

*"Where an employee has access to a wall opening from which there is a drop of more than 1.2m or to a floor opening, guardrails shall be fitted around the wall opening or floor opening or it shall be covered with material capable of supporting all loads that may be imposed on it."*

### Air Brake Shop Investigation

Mr. Stevens claimed the varsol product bothered his hands and eyes. It was not known if the source of Mr. Stevens' rash problem was the varsol product, the surgical gloves or something else. Mr. Stevens was under doctor's care and prescribed medication was working to relieve the problem. Further medical appointments were scheduled. Mr. Stevens was offered an inner cotton liner to wear inside the surgical gloves. Mr. Stevens was asked to defer this portion of his work refusal until his treatment could be completed. Also safety glasses with shields were to be worn in the building.

At the time of the investigation, the varsol was stored in a container 18" x 6" x 8". The safety officer could not say whether the bin was properly labelled at the time of Mr. Stevens' work refusal, however, the varsol container bin was properly labelled at the time of the investigation.

Emergency showers were located in the battery room about 100 feet away. Regular employee showers located on the second floor about 100 feet way were also available.

An emergency eyewash stand was located in the battery room. A portable eyewash bottle used to be located in the Air Brake shop, however it was removed because the contained material would not remain sterile. The safety officer requested that the employer install an eyewash stand as soon as possible. The employer advised that it ordered a new system and expected to install it upon receipt in a couple of weeks<sup>1</sup>. The employer advised that they were in the process of installing a new emergency shower and eyewash stand within 20 feet of the Brake Shop during 1995. It was determined that existing showers would do in case of emergency.

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<sup>1</sup> The portable eyewash station was installed as an extra precaution a couple of weeks after Mr. Stevens' work refusal.

The employer obtained varsol from two suppliers - Petro-Canada product called Petrosol 3139 Solvent and Esso product called Varsol 3139 Solvent. The MSDS for the Esso product was up to date. The MSDS for the Petro-Canada product was still valid for another 8 days.

A notation of "use explosion-proof mechanical ventilation suitable for group D atmosphere" contained in the MSDS caused concern for Mr. Stevens. This notation was not contained in the MSDS for the ESSO product. ESSO's MSDS contained the notation "the use of local exhaust ventilation is recommended ... provide mechanical ventilation of confined space". The employer did not understand what was meant by Petro-Canada's notation and undertook to find the Petro-Canada definition of explosion proof and what it entailed. Until it could answer these questions and the requirement specified on the MSDS, the employer decided to cease using the Petro-Canada product. The air brake shop was designed with the knowledge of hazardous products being used.

In order to clarify certain points of information around the ventilation issue, the safety officer continued to be in contact with both the employer and Mr. Stevens by fax and telephone over the next couple of days.

#### Outdated MSDS Investigation

Examination of the air brake shop MSDS book on October 28, 1994 indicated that approximately 30% of the sheets were outdated; some by a few weeks some by more. For the thirteen products covered by Mr. Stevens' work refusals of October 18 and 24, 1994, 6 MSD sheets had since been updated. According to Mr. Stevens, 3 sheets were still outdated.

Following the investigation, the safety officer wrote and issued reports for the following work refusals:



1) October 18, 1994 at approximately 11:25 hours - Open pit on track #3 was too close to work station. Report dated November 1, 1994.

2) October 18, 1994 at approximately 12:45 hours - Rash on skin; Inadequate shower facilities for emergency purposes; Inadequate eyewash facilities for emergency purposes; Outdated MSDSs (some outdated, are to be updated); Concern for explosion proof ventilation availability. Report dated October 31, 1994.

3) October 24, 1994 - Some MSDS outdated; Some decanters not properly labelled as per section 10 of the Regulations. Report dated October 31, 1994. This investigation report dated October 31, 1994 noted: 1) the supervisor requested Mr. Stevens to review the MSDS books to ascertain they complied with the legislation and for the purpose of updating the MSDS books; 2) the employee was to work at upgrading program; not work with the products or decanters; 3) that some decanters were not properly labelled as per section 10 of the Regulations at the time of the safety officer's investigation; 4) that should claimant [Mr. Stevens] have to use these [improperly labelled] decanters, then he can refuse to do so until he knows what it contains; and 5) cannot refuse to step onto property for a hazard that is not specific and which may or may not exist.

### Submissions of the Parties

#### Safety Officer

The safety officer submits that it is important to note the chronology of events and the circumstances surrounding the work refusals. Although the jurisdictional question created a problem for how quickly the actual investigation into the work refusals of October 18, 1994 took place after the refusals occurred, it was not a factor in the actual decision that was made in regard to the refusals. If a safety officer is not able to immediately respond to a work refusal, the employer can assign the employee to reasonable alternate work in accordance with section 129 (3). This did occur

following Mr. Stevens' work refusals. The fact that the investigation took place several days after the work refusals is not an important factor in these work refusals.

The safety officer further submits that for a finding of danger, danger must be immediate. The employee's exposure to the hazard or condition must be such that the likelihood of injury is obvious. The danger must be more than hypothetical. His investigation indicated that there was no evidence that these MSD sheets, although not the most up-to-date, would cause a danger to Mr. Stevens' health. Theoretically some of the material Mr. Stevens was using could have been changed significantly since the last MSD sheet was filed on such material, however, there was no evidence that the danger had increased for this reason.

The safety officer was given a general situation to deal with. If Mr. Steven had cited a chemical or a compound in a chemical that caused immediate danger, then he could have had reasonable cause. He did not raise anything specific nor identify a chemical that was injurious to his health or created a hazard to him. Investigation indicated that the issue behind the work refusals involving the MSD sheets involves Hazardous Substance Regulation, section 10.32 (4) (a). Mr. Stevens' concerns could have been addressed and pursued through the health and safety committee. There are procedures for updating MSD sheets. If the employer refused to comply with the Regulations, then a complaint could have been filed more appropriately through the Labour Program. No complaint regarding this matter had been filed through Labour Program.

Mr. Stevens was given every opportunity to participate in the investigation conducted and given every opportunity to bring up his concerns. Following the investigation into the work refusals, there was no evidence to believe that the reasons cited by Mr. Stevens satisfied the meaning of danger in the Code.

### Applicant's Submissions

Mr. Stevens submits that he complained about outdated MSD sheets on October 19, 1994. This work refusal was not investigated by the safety officer. The safety officer should have proven there was a work refusal.

According to the complainant, nothing indicates that Labour Canada carried out an investigation into this work refusal which falls within the scope of Workers Hazard Material Information System (WHMIS) legislation; no proper labels; no training in WHMIS legislation; no precautionary measures. The issue to be determined in this instance is that there was a work refusal that was not investigated.

The complainant also points out that the safety officer combined the refusals of October 18 and 24, 1994 involving outdated MSD sheets into one investigation. The safety officer failed to conduct a thorough and proper investigation into each of the work refusals invoked by Mr. Stevens.

Mr. Stevens argued that under WHMIS legislation, proclaimed in October 1988, MSDSs must be supplied for every control product and updated at least every three years; the containers must be properly identified and workers must be trained to use the information to protect themselves. Mr. Stevens' opinion was that for a matter to be properly dealt with through the health and safety committee, there must be cooperation and sharing of responsibilities in the workplace. The complainant submitted that although a joint Health and Safety survey conducted had concluded that training and labelling was less than adequate, the employer had done nothing.

### Employer's Submissions

The employer has approximately 1500 MSD sheets in information books located in various workplace locations. The employer has been actively seeking to get each MSD sheet reviewed and updated. Updating MSDSs is an ongoing process. The



employer sent out 300 letters to suppliers in 1993 requesting updates to MSD sheet and products listed. By May 1994 approximately 50 replies had been received. The company has a CD ROM from the Canadian Center for Occupational Health and Safety which contains about 200,000 MSDS entries available and is updated every three months. The employer has received 4 inquiries into the use of the CD-ROM between 1990 and April 1995.

The MSD sheets about material alleged to cause dermatitis were updated following Mr. Stevens' work refusal on October 18, 1994. He continued his work refusal. The work refusal that Mr. Stevens stated occurred on the 19th took place on the 18th and was investigated by the joint health and safety committee on the 19th. Discussions and investigations with the joint health and safety committee regarding the issues involved in Mr. Stevens' work refusals took place between the 18th and the 21st. The matter regarding an October 19, 1994 work refusal, and the WIMIS training or lack of WIMIS training had not been raised with the safety officer prior to the Board's inquiry.

#### Board's Decision Concerning the Safety Officer's Investigation into the Work Refusals

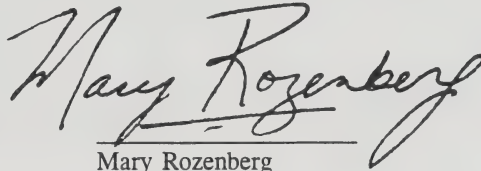
The focus for the safety officer in conducting an investigation into work refusals is to determine whether a danger within the meaning of the Code exists at the time of his investigation (Canada (A.G.) v. Bonfa (1989), 73 D.L.R. (4th) 364 (C.A.F.); and Bidulka v. Canada [1987] 3 F.C.A. 630). When the Board receives a referral, it must place itself in the shoes of the safety officer and inquire into the circumstances of the refusal. The Board is governed by section 130 (1) of the Code which stipulates that its jurisdiction is limited to reviewing the circumstances and the reasons for the safety officer's decision (Dennis C. Atkinson (1992), 89 di 76; (CLRB no. 958) and Richard Boivin et al. (1992) 87 di 36 (CLRB no. 916)). The Board has no general power to go beyond this. For the Board to reach a different conclusion, it would have to find that the safety officer's investigation had not been conducted in a proper manner, or

that the definition of danger used by the safety officer in making his determination was at odds with that found in Part II of the Code.

The right to refuse to work is an emergency measure for situations where employees are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work (Antonia Di Palma (1995), 98 di 161 (CLRB no. 1131)). Nor is the possibility of injury or potential for danger sufficient to invoke the work refusal provisions. This provision must not be used by employees as a vehicle for attaining other objectives of Part II of the Code or for resolving labour relations issues and disputes. Where such refusals coincide with other labour relations disputes, the Board will pay particular attention to the circumstances of the refusal. (Scott C. Montani (1994), 95 di 157 (CLRB no. 1089); Terence J. Grams (1994), 95 di 29 (CLRB no. 1079); Stephen Brailsford (1992), 87 di 98 (CLRB no. 921); Cesare Peretti (1991), 86 di 157 (CLRB no. 906); David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686); William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332); and Ernest L. LaBarge (1981), 47 di 18; 82 CLLC 16,151 (CLRB no. 357)).

Many issues were involved in the work refusals that Mr. Stevens invoked between October 18 through to October 24, 1995, and they were all investigated. These work refusals involved: an unprotected open maintenance pit too close to Mr. Stevens' work area; the use of varsol solvent that bothered his hands and eyes; improperly labelled containers; inadequate emergency-use showers and eye wash station; and outdated MSDSs. These issues were thoroughly investigated by a Labour Canada safety officer with the assistance of two Ontario Ministry of Labour safety officers. The Labour Canada safety officer made a finding based on the situation at the time of his investigation. Following clarification of certain points of information, he subsequently issued investigation reports and directives based on his findings from his investigation.

If Mr. Stevens' complaint had been timely, and if, consequently, the Board had the jurisdiction to deal with Mr. Stevens' request to refer the safety officer's decision the Board would have confirmed the safety officer's decision.

A handwritten signature in black ink, reading "Mary Rozenberg". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

Mary Rozenberg  
Board Member





# information

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## Summary

Wally Klippenstein, *applicant*, and Canadian National Railway Company, *employer*.

Board File: 950-312  
CLRB/CCRT Decision no. 1178  
August 9, 1996

SEP 12 1996

University of Toronto

## Résumé

Wally Klippenstein, *requérant*, et Compagnie des chemins de fer nationaux du Canada, *employeur*.

Dossier du Conseil: 950-312  
CLRB/CCRT Décision n° 1178  
le 9 août 1996

These reasons deal with the referral to the Board of a decision issued by two safety officers under section 129(5) of the Canada Labour Code.

The applicant, an assistant conductor with the Canadian National Railway Company, invoked his right to refuse to work on May 16, 1995 because he did not have a window located in front of his seat to give him a good view of the track at all times.

Two Transport Canada safety officers conducted an investigation and could not find a danger as contemplated by the Code. They did find that there was a possibility of danger should the applicant fail to be vigilant in performing his duties; however, this meaning of danger is not contemplated in the Code as currently written.

The union, representing the applicant, contended that the safety officers' investigation was flawed because the officers had failed to wait for the applicant's chosen health and safety representative before undertaking their investigation; they had also

La présente décision traite du renvoi au Conseil d'une décision de deux agents de sécurité aux termes du paragraphe 129(5) du Code canadien du travail.

Le requérant, un chef de train adjoint qui travaille pour la Compagnie des chemins de fer nationaux du Canada, a invoqué son droit de refuser de travailler le 16 mai 1995 parce que la fenêtre qui se trouvait entre le siège du chef de train et celui du conducteur de locomotive n'était pas bien placée, l'empêchant parfois de bien voir les voies ferrées.

Deux agents de sécurité de Transports Canada ont mené une enquête et ont jugé qu'il n'y avait pas de danger au sens du Code. Ils ont constaté qu'il y avait une possibilité de danger si le requérant ne se montrait pas vigilant dans l'exercice de ses fonctions; toutefois, cette acception de danger n'est pas prévue dans le Code tel qu'il est libellé présentement.

Le syndicat qui représente le requérant prétend que l'enquête des agents de sécurité était déficiente parce que les agents n'avaient pas attendu le représentant du comité de santé et de sécurité choisi par le requérant avant d'entreprendre l'enquête; ils avaient également

failed to consider a number of reasonable factors.

The Board concurred with the findings of the safety officers. Nothing in the evidence led the Board to conclude that important or relevant elements were overlooked or improperly considered by the safety officers.

omis de prendre certains éléments en considération.

Le Conseil souscrit à la décision des agents de sécurité. Rien dans la preuve n'amène le Conseil à conclure que les agents ont omis ou mal compris un élément important ou pertinent.

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## Reasons for decision

Wally Klippenstein,

*applicant,*

*and*

Canadian National Railway Company,

*employer.*

Board File: 950-312

CLRB/CCRT Decision no. 1178

August 9, 1996

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The Board was composed of Ms. Mary Rozenberg, Board Member, sitting as a single member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). In accordance with section 130(1), an inquiry was held on October 16, 1995 in Vancouver.

These reasons were written by Ms. Mary Rozenberg, Board Member.

### Appearances

Mr. Walter Plomish, Union Legislative Assistant, Local 422 of the United Transportation Union, for Mr. Wally Klippenstein;

Mr. Allan E. Bartlett, Safety Officer at Transport Canada, assisted by Mr. Murray M. West, Safety Officer, at Transport Canada;

Mr. Brent J. Ballingall, Human Resources Officer at the Canadian National Railway Company.

These reasons deal with the referral to the Board of a safety officer's decision under section 129(5), Part II of the Canada Labour Code (Occupational Safety and Health). This referral arose from a refusal to work exercised by an employee of the Canadian National Railway Company (CN) on May 16, 1995. The applicant, Wally Klippenstein, assistant conductor, invoked his right to refuse dangerous work because he could not see in the direction of train movement from his seated position. As an assistant conductor, Mr. Klippenstein has a responsibility to ensure that all operating rules are followed and could position himself to see all signals in order to comply with said rules.

The removal of the caboose on the Chilliwack run brought a change in operations. May 15, 1995 was the first time that CN operated a train without a caboose. Up until that time, the caboose had been used by crew members to transport their personal effects. Without the caboose, crew members had to use the locomotive cab.

Two Labour Canada safety officers investigated Mr. Klippenstein's work refusal and made a finding of "no danger". Their investigation report was forwarded on May 17, 1995, via registered mail, to Mr. Klippenstein who received it on May 25, 1995. On June 1, 1995, Mr. Klippenstein requested that safety officer Bartlett refer the decision to the Board, which the officer did on June 5, 1995.

#### The Investigation

On May 16, 1995, the crew on train #534 was preparing for the Chilliwack run when Wally Klippenstein exercised his right to refuse unsafe work.

Rick Olsson, the conductor of the crew on May 16, 1995 and secretary of Local 701, was present when Mr. Klippenstein invoked his right to refuse on May 16, 1995 and remained with Mr. Klippenstein throughout the investigation. He advised the Board that he was present with Mr. Klippenstein on May 16, 1996 as an observer, not as Mr. Klippenstein's representative.

Jim Raynard, Superintendent Transportation-Production, placed a call to Transport Canada to report the work refusal. Wally Klippenstein requested union representative Robert McDiarmid, the designated health and safety committee representative for Local 701, be present. Mr. Raynard placed a call to request Mr. McDiarmid's presence for the investigation. Wally Klippenstein and Rick Olsson, the conductor, waited for the safety officers in the yard's boardroom.

Allan Bartlett, safety officer with Transport Canada, received a phone call from Jim Raynard at 08:00 hours on May 16, 1995 advising him of a work refusal at the CN Thornton yard in Surrey. Two Transport Canada safety officers, Allan Bartlett and Murray West, arrived to conduct an investigation that same day at approximately 08:30 hours.

The safety officers' investigation consisted of three segments: the initial discussions in the boardroom; the viewing of the locomotive cab; and further discussions in the boardroom.

The initial discussions concerned seating arrangements in the long hood locomotive cab and included Wally Klippenstein, the assistant conductor and refuser; Rick Olsson, the conductor; Jim Raynard, the Superintendent Transportation-Production; and Allan Bartlett and Murray West, Transport Canada safety officers.

Mr. Klippenstein stated that his view was restricted because he did not have a window in front of his seat in the long hood unit. This seating arrangement made it unsafe because he could not see the CTC signals and the signal indications at all times. To be able to do so would require him to leave his seat and stand either behind the locomotive engineer's seat or behind the conductor.

The conductor and assistant conductor seats in locomotives were realigned to a side-by-side position when the units were refurbished. This modification was undertaken

by CN to improve site lines. Although this modification did in fact improve site lines in the short hood leading units, it did not for the long hood leading units.

With the seats positioned side by side, Mr. Klippenstein found it impossible to be vigilant in order to comply with all operating rules. Although Mr. Klippenstein was aware of the signals and signs between points, he stated that he had not memorized all signal locations. In order to identify all signals and signs, Mr. Klippenstein found that he had to stand behind either the conductor or engineer and that he had to stoop because the window is at a level allowing viewing by a seated person. This stooping brought a chill to his back. Moreover, the cab quarters are cramped. This coupled with sharp corners, lots of objects in the cab and the short distance to the step-well adds to the danger while performing duties from a standing position in a moving unit particularly if a sudden jolt or a sudden stop should occur. Although Mr. Klippenstein did not think that he would fall out, he felt that he could probably fall onto the conductor or the engineer. Prior to going cabooseless, Mr. Klippenstein stated that he would, on occasion, have to get out of his seat to perform his duties but not as frequently.

Mr. Klippenstein and Mr. Olsson suggested adding a second unit to the long nose unit, or using a short hood leading unit, where everyone would see in both directions would resolve Mr. Klippenstein's viewing problem.

The safety officers then looked at the locomotive cab and examined the seating arrangement between 08:30 and 09:00 hours. In attendance during this segment of the investigation were Gary Jones, Allan Bartlett and Murray West. Neither Messrs. Klippenstein and Olsson nor the designated union health and safety representative attended the safety officers' viewing of the locomotive cab on May 16, 1995. Messrs. Klippenstein and Olsson remained in the boardroom while the safety officers viewed the cab. The safety officers returned to the boardroom for further discussions.



Mr. McDiarmid arrived at the site of Mr. Klippenstein's work refusal at approximately 09:00 hours as the safety officers were returning to the boardroom after viewing the locomotive cab. Mr. McDiarmid had a brief discussion with Mr. Klippenstein and Mr. Olsson in the boardroom while waiting for the safety officers. The safety officers discussed the work refusal and reviewed their investigation with Mr. McDiarmid. They believed that Mr. Klippenstein's refusal was identical to the refusal exercised by Mr. Olsson on the previous day, May 15, 1995.

After communicating their finding of "no danger" to Mr. Klippenstein, the safety officers returned to their office to complete the necessary reports and paperwork.

After the departure of the safety officers, Mr. McDiarmid, accompanied by Mr. Allan Jones, Manager of Train Service, viewed the locomotive cab. Once he had the opportunity to view the locomotive, Mr. McDiarmid stated he felt that the two refusals were not identical. According to Mr. McDiarmid, at issue in Mr. Olsson's refusal on May 15, 1995 was the uncleanness of the cab and the hazards caused by the baggage that was improperly stored. At issue in Mr. Klippenstein's refusal on May 16, 1995 was the seating arrangements and his viewing problem. Mr. McDiarmid did not make any further attempts to contact the safety officers.

The crew was instructed to return to work. The crew members climbed aboard the locomotive and went to work at approximately 10:00 hours. The Chilliwack run was completed with the long hood unit leading without incident.

Mr. Olsson advised the Board that he could not recall any of the discussions regarding Mr. Klippenstein's work refusal and the safety officers' investigation prior to Mr. McDiarmid's arrival. He did, however, recall that upon Mr. McDiarmid's arrival, the safety officers reviewed the safety investigation procedure.

Considerations Addressed by the Safety Officers

Both safety officers have worked with Transport Canada for a number of years and have conducted section 129 investigations. Safety officer Bartlett held various positions in the rail industry with CN and CP for approximately 46 years.

The distance of the Chilliwack run is 44.2 miles. Fixed signal locations and train crossings are not items that are easily transferable all the time. Mr. Klippenstein has worked the Chilliwack run for a number of years. He would be very familiar with the locations of the fixed signals and the train crossings along the route. Mr. Klippenstein is fully qualified, licensed, and certified according to the Canadian Railway Operating Rules. He is also a knowledgeable and experienced assistant conductor with both long nosed and short nosed units and he works with a knowledgeable and experienced conductor.

The safety officers considered all operating rules in rendering their decision: Railway Transport Committee rule 1.14 - appropriate seating accommodations in cabooseless operations; Part VII, section 42 - employee seating suitably located to permit them to properly perform their duties contained in the Operating Employees' Safety and Health Regulations; Canadian Rail Operating Rules and rule 34 - fixed signal recognition and compliance; General Operating Signs; and the major rail crossings and public access between Surrey and Chilliwack.

It is recognized that the space in a locomotive cab is restricted. This problem is compounded by the addition of cab equipment, crew and crew equipment. There is nevertheless adequate storage in the hood for crew members' bags.

It was not anticipated that crew members would never stand up during a run. Crew members do get up and walk around the cab to stretch their legs, to get a coffee, etc. Performance of their duties does not confine crew members to their seats.

On May 15, 1995, Mr. Olsson invoked his right to refuse to work because he felt it was dangerous to move on a locomotive if the assistant conductor had a viewing problem. Safety officers Bartlett and West investigated the May 15, 1995 work refusal involving the same locomotive cab and the same crew members except for Mr. Klippenstein as he was not at work for that particular shift. While conducting this investigation, the safety officers found the locomotive cab to be unfit due to the cab's uncleanliness and the hazards caused by the crew's baggage stored behind their seats. They required the crew to store in the proper place and to clean up the cab. The crew completed its scheduled Chilliwack run without any incident.

The safety officers considered the meaning of danger under section 122(1) of the Code. They found that there was no immediate hazard, condition or danger that could reasonably be expected to cause injury to Mr. Klippenstein at the time of their investigation.

#### Union's Submissions

The union submitted, on behalf of the applicant, that all CN crew members assigned to a locomotive must be vigilant in the performance of their duties. This includes monitoring the track at all times in the direction of movement. In a cabooseless operation, the only safe means of providing a clear and unobstructed view of the track is for CN to provide a consist of two CN switcher locomotives back to back with short hood leading and long hood following (exhibit #9).

The union contended that CN failed to give reasonable interpretations to operating rules and regulations such as CN's Operating Manual, RTC Order R-41300, and Operating Employee Safety & Health Regulations, Part 7. Part II of the Code places obligations on CN to take all reasonable and necessary precautions to ensure the safety and health of its employees.

When CN removed the caboose from the Chilliwack run on May 15, 1995, the train conductor, Mr. Olsson, invoked his right to refuse because he felt it was unsafe to operate a long hood leading locomotive if the assistant conductor had viewing problems.

On May 16, 1995, Mr. Klippenstein, assistant conductor, invoked his right to refuse because he felt he could not perform his duties in a safe manner because he could not see the track to identify the CTC signals or the public and private train crossings at all times along the 44.2 mile Chilliwack run. He could not maintain the level of vigilance required by CN operating rules. For Mr. Klippenstein to perform his duties with the diligence required of him, he had to stand behind either the conductor or the engineer and to lean over the shoulder of one of them. Located behind the conductor's seat is his table, and located behind the engineer's seat off to the side is the step-well. Any sudden or unexpected train movement can therefore become a safety hazard.

The union submitted that the safety officer's investigation was flawed because the safety officers failed to wait for Mr. Klippenstein's safety and health representative before undertaking their investigation. That investigation was completed and their decision was made when the safety and health representative did arrive. Mr. McDiarmid felt that he did not have an opportunity to actively and fully participate in the investigation and consequently he did not have an opportunity to provide some input. Although Mr. McDiarmid was provided an opportunity to



discuss the matter with the safety officers, he would have liked to do so after he had viewed the locomotive. But that was not to be because the safety officers merely told the safety and health representative of their decision and then left the property.

The union further submitted that the safety officer's decision was also not reasonable because the safety officers did not explore or take into consideration the reasonableness of having to maintain the required level of vigilance to perform duties safely; the reasonableness of Mr. Klippenstein's desire to have a well-located seat in order to identify the CTC fixed signals and their indications; the practicability of Mr. Klippenstein being able to carry out his duties in a safe manner; the reasonableness of having to lean over the conductor or the engineer in order to see properly; and the likelihood of falling and injuring himself or the conductor with a sudden jolt or emergency brake application.

The union argued that the safety officers failed to consider RTC Order R-41300 (the rules regarding cabooseless trains) in their investigation. According to the union, when the caboose was removed from the Chilliwack run, the conductor and assistant conductor seats should have been relocated or the locomotive consist should have been made up of two locomotives coupled together. Another factor for consideration is the tripping hazard attributable to the crew's stored baggage behind their seats for easier access while the train is in motion.

#### Safety Officers' Submissions

The safety officers submitted that the parameters with which Transport Canada has to work under Part II of the Canada Labour Code are very restrictive; their role is to investigate work refusals to determine if a danger, as contemplated by the Code, exists and then to make a determination based on the findings of the investigation.

At issue is whether the windows in the long nose units were adequate and ideally located. The safety officers recognized that the seating arrangement was not ideal. The space in the cab area is very confining and corners are rounded not sharp. There are dangers inherent in the work done by Mr. Klippenstein and other crew members as there are in any type of work. These inherent dangers may differ for individuals and some occupations have more inherent dangers than others.

Canadian Operating Rules protect all rail employees against accidents if they are followed. All assigned crew members are qualified, licensed, certified and familiar with these rules. All crew members and other rail employees are required to exercise due diligence and caution in the performance of their duties and obtain clearances in accordance with the operating rules.

#### Employer's Submissions

The employer submitted that it is aware of its duties and responsibilities under sections 124 and 125 of the Code and takes these seriously. Long hood leading locomotive units have adequate windows. Cab seating arrangements and interior cab configuration have been discussed at great length by employer and UTU representatives. All regulations have been reviewed to ensure that all duties can be performed in a safe manner. Seating arrangements in all locomotive cabs meet all legislative and collective agreement requirements. From time to time, crew members may be required to stand in doing their work. Mr. Klippenstein could, can and continues to carry out his duties in a safe manner without endangering himself or anyone else.

### Decision

Because the safety officers conducted part of their investigation (the initial discussions the viewing of the work refusal location) in the absence of either the refuser or and the refuser's designated union health and safety representative, is their investigation invalid?

Section 129(1) reads as follows:

*"129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative."*

(emphasis added)

Mr. Klippenstein did have a union representative in attendance with him at the time of his work refusal and during the safety officers' investigation. The union representative may not have been the person chosen by Mr. Klippenstein. Nevertheless, Mr. Olsson was a union representative. Why Mr. Klippenstein and Mr. Olsson remained in the boardroom while the safety officers viewed the cab instead of accompanying the safety officers was not explained. Mr. Olsson could not recall any of the discussions that occurred prior to Mr. McDiarmid's arrival. They could have accompanied the safety officers.

Mr. McDiarmid spoke with the safety officers regarding Mr. Klippenstein's work refusal. Furthermore, he did have an opportunity to view the cab. Why, if he had concerns following his viewing the cab, did Mr. McDiarmid who was an experienced

union representative in health and safety matters not attempt to contact the safety officers to discuss the matter further? He could have contacted the safety officers by phone or required them to return to the work site. He did not. The Board concludes in these circumstances that the union cannot now claim that the investigation is invalid.

The focus for the safety officer is the meaning of danger as contemplated in the Code and whether a danger exists to an employee at the time of their investigation. Danger is defined in section 122(1) as "any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected." The safety officer must determine whether the risk of injury or illness to employees is so acute that the use of a particular machine, thing or place must cease until the situation is rectified. The safety officer must be able to identify, during an investigation, a specific hazard or condition that exists, which unless immediate action is taken, could reasonably be expected to cause injury to the employee.

The Board's jurisdiction with respect to a referral of a safety officer's decision under section 129(5) is set out in section 130(1) of the Code. The Board is limited to examining the circumstances of the safety officer's decision and the reasons therefore.

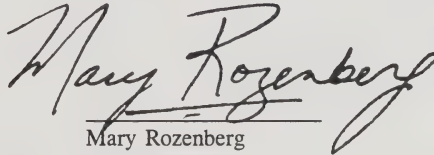
The right to refuse is an emergency measure to be used only in situations where employees are faced with immediate danger and where injury is likely to occur right then and there. Danger must be more than hypothetical. The possibility of injury or potential for danger is not sufficient to invoke the work refusal provisions. See Scott C. Montani (1994), 95 di 157 (CLRB no. 1089); Stephen Brailsford (1992), 87 di 98 (CLRB no. 921); and David Pratt (1988), 73 di 218; and 1 CLRB (2d) 310 (CLRB no. 686).



The safety officers conducted an investigation and could not find a danger as contemplated by the Code. They did find that there could be a possibility of danger, should Mr. Klippenstein fail to be vigilant in performing his duties. However, this meaning of danger is not contemplated in the Code as it is currently written.

The Code does not provide safety officers or the Board with any authority to expand the meaning of "danger."

Having considered the particular circumstances of this referral, the Board confirms the safety officers' decision. Danger as contemplated by the Code was not evident at the time of their investigation, nor could such a danger be identified by Mr. Klippenstein. Nothing was adduced that would lead the Board to conclude that any important or relevant elements were overlooked or improperly considered by the safety officers.



Mary Rozenberg  
Board Member



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## Summary

United Steelworkers of America, applicant/complainant, and Echo Bay Mines Ltd., employer.

Board Files: 555-4047  
745-5323  
745-5366

CLRB/CCRT Decision no. 1179  
August 23, 1996

The union alleged that the employer violated sections 94(1)(a), 94(3)(a), 94(3)(e) and 96 of the Canada Labour Code by dismissing Norm Smith, disciplining Margaret Crowley and Scott Ritchie, and refusing to accommodate Peter Perry with respect to his vacation leave.

In addition, the union applied for certification as the bargaining agent of the employer's employees. In light of the employer's conduct since the inception of the organizing drive, the union applied, pursuant to section 29(1) of the Code, for an order directing that a representation vote be held, notwithstanding that less than 35% of the employees had applied for union membership.

The Board reviewed the conduct of the employer from the outset of the organizing drive and with respect to each of the employees named. In each instance it found that the employer had violated the Code in that its conduct was motivated by anti-union animus. The Board gave appropriate orders for reinstatement and compensation.

## Résumé

Métallurgistes unis d'Amérique, requérant/plaignant, et Echo Bay Mines Ltd., employeur.

Dossiers du Conseil: 555-4047  
745-5323  
745-5366

CLRB/CCRT Décision n° 1179  
le 23 août 1996

Le syndicat allègue que l'employeur a enfreint les alinéas 94(1)a), 94(3)a), 94(3)e) ainsi que l'article 96 du Code canadien du travail lorsqu'il a congédié Norm Smith, imposé une mesure disciplinaire à Margaret Crowley et Scott Ritchie, et refusé d'accorder les congés annuels demandés par Peter Perry.

En outre, le syndicat demande d'être accrédité à titre d'agent négociateur des employés de l'employeur. Compte tenu de la conduite de l'employeur depuis le début de la campagne de recrutement, le syndicat demande, aux termes du paragraphe 29(1) du Code, que le Conseil ordonne un scrutin de représentation, même si moins de 55 % des employés veulent être membre d'un syndicat.

Le Conseil a examiné la conduite de l'employeur depuis le début de la campagne de recrutement, à l'égard de chacun des employés en cause. Dans chaque cas, il juge que l'employeur a enfreint le Code, en ce sens que sa conduite était motivée par un sentiment antisyndical. Le Conseil rend donc les ordonnances de réintégration et de dédommagement qui s'imposent.



With respect to the union's application pursuant to section 24(2)(a) of the Code, the Board concluded that the conduct of the employer, taken as a whole, was so purposively intimidating and frustrating as to put a pervasive and effective chill on the union's organizing drive.

The Board determined that where the actions of the employer effectively chill the organizing drive by either directly or indirectly intimidating or discouraging employees from freely exercising their choice to belong to a union, the exercise of its discretion under section 29(1) is warranted. The Board accordingly ordered that a vote, pursuant to section 29(1) of the Code, be conducted.

In addition, the Board directed that the employer reimburse the union for expenses incurred by the union in attending at the employer's mine site for organizing purposes.

Finally, the Board concluded that the employer's purposive and egregious anti-union animus justified an order, pursuant to section 99, compelling the employer to pay the cost of the union's representation of each of the individual complainants.

Enfin, en ce qui concerne la demande du syndicat fondée sur l'alinéa 24(2)a) du Code, le Conseil conclut que la conduite de l'employeur, prise dans son ensemble, était à dessein tellement intimidante et frustrante qu'elle minait effectivement la campagne de recrutement.

Le Conseil juge que si la conduite de l'employeur mine effectivement la campagne de recrutement, soit en intimidant directement ou indirectement les employés, soit en les décourageant d'exercer leur droit d'association, l'exercice du pouvoir discrétionnaire que lui confère le paragraphe 29(1) est justifié. Par conséquent, le Conseil ordonne qu'un scrutin de représentation soit tenu aux termes du paragraphe 29(1) du Code.

En outre, le Conseil ordonne à l'employeur de payer les frais engagés par le syndicat dans le cadre de sa campagne de recrutement sur les lieux de travail.

Par ailleurs, le Conseil conclut que l'énorme sentiment antisyndical délibéré dont l'employeur a fait preuve justifie, aux termes de l'article 99, une ordonnance selon laquelle l'employeur sera tenu de payer les frais de représentation de tous les plaignants.

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## Reasons for decision

United Steelworkers of America,

*complainant,*

*and*

Echo Bay Mines Ltd.,

*employer.*

Board Files: 555-4047, 745-5323, 745-5366

CLRB/CCRT Decision no. 1179

August 23, 1996

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The Board was composed of Richard I. Hornung, Q.C., Vice-Chair and Mr. Patrick H. Shafer and Ms. Roza Aronovitch, Members.

### Appearances

Mr. David T. Williams, Counsel, accompanied by Mr. Gilles Deslauriers, for the complainant; and

Mr. Fausto Franceschi and Mr. Joseph H. Hunder, Counsel, accompanied by Mr. Tim Butler, for the employer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

### I

The United Steelworkers of America filed an application for certification and four unfair labour practice complaints with the Board.

The application and complaints were contained in a single letter which set out the particulars of the same. Specifically it is alleged that the employer breached sections 94 and 96 of the Code by;

- 1) dismissing Norm Smith;
- 2) disciplining Margaret Crowley;
- 3) disciplining Scott Ritchie; and
- 4) refusing to accommodate Peter Perry with respect to his vacation leave.

in that its conduct with respect to each of those individuals was motivated by the Employer's anti-union animus. The union accordingly requests appropriate remedial orders from the Board in each case.

In addition, the union's application requests the following relief:

*"2) Pursuant to Sections 94 and 96 of the Code, the Union requests an Order that Echo Bay Mines Ltd. (the 'Employer') and persons acting on behalf of the Employer be directed to cease and desist interference with the formation and administration of the Union and interference with the representation of employees by the Union. The Union further alleges that the Employer's actions are designed to intimidate and coerce employees contrary to Section 96.*

*3) Pursuant to Section 24(2)(a) of the Code, the Union applies for Certification and requests that the Board Order a representation vote pursuant to Section 29(1) of the Code."*

The hearing in this matter was protracted; the evidence presented was extensive. This decision will outline the evidence material to its conclusions. In many cases the evidence was disputed. In cases where there was a dispute, the description of the

facts contained in this decision represents, where necessary, the Board's determination with respect to the same.

## II

Echo Bay operates a gold mine at the Lupin mine site in the Northwest Territories. Since early 1995 it has been subject to an organizing campaign by the United Steelworkers of America. The Board has been called upon on a number of occasions in the last year and a half to make determinations, and provide directions to the parties, with respect to the organizing campaign and allegations of unfair labour practices which have arisen therefrom.

The historical relationship between the parties is relied upon by the union to support the allegations of anti-union animus which it says motivated the employer's conduct in the present complaints. It also provides a backdrop for the union's request, in its certification application, that the Board order a vote pursuant to section 29(1). A brief summary of this relationship follows.

In file no. 800-33 involving Echo Bay Mines Ltd., a Board order was issued on May 4, 1995 directing union access to the employer's premises at Lupin for the purposes of carrying out its organizing campaign. Pursuant to the employer's demand, the Board subsequently reheard the application in Edmonton. Following thereto, the Board issued another order, on May 19, 1996, directing access of union representatives to Lupin.

After the board granted the above access order, two representatives of the union attended at Lupin for organizing purposes. When they arrived they were met by two Pinkerton Security Guards who literally followed them around the mine site, watched them as they talked with Echo Bay employees and attempted to listen in on their conversations. In addition, the office designated to the union for its use during the organizers' stay at Lupin, was entered into without permission and confidential

material was disturbed. Further, material which had been distributed by the organizers to employees during their lunch was immediately retrieved from each employee by the security guards. As a consequence, the union filed further unfair labour practice complaints which were scheduled for hearing in Edmonton in June 1995. Following meetings with the parties, the Board granted an order, agreed to by the parties, providing for unobstructed union access to the Lupin site along with the attendance of a Board officer to assist in the enforcement of the Board's order: see Echo Bay Mines Ltd. (1995) Board order issued on June 27, 1995, in Board file nos. 530-2418 and 745-5105.

In Echo Bay Mines Ltd. (1995), as yet unreported CLRB decision no. 1140, September 29, 1995, affirmed by the Federal Court of Appeal (Echo Bay Mines Ltd. v. United Steelworkers of America and Margaret Crowley, judgment rendered from the bench, A-676-95, February 22, 1996), the Board found that the union's dismissal of Margaret Crowley, a nurse, on the pretext of her insubordination, was motivated by anti-union animus and, on September 28, 1995, the Board ordered the immediate reinstatement of Crowley to her position at Echo Bay on the next available shift. Notwithstanding the Board's order, the employer did not reinstate Crowley. On October 25, 1995 it appealed the Board's order to the Federal Court of Canada. The Board's order was filed with the Federal Court on November 20, 1995 (Board file no. 760-110). On November 24, 1995 the Employer applied for a stay of the Board's order. In material attached to the stay application, Mr. Jerry McCrank, the Mine Manager, candidly swears that Crowley's trade union activity: "...jeopardizes her ability to work as a nurse at Lupin...". The stay application was dismissed by the Court on December 4, 1995. Margaret Crowley was only returned to work on December 8, 1995.

On August 24, 1995, the union filed another unfair labour practice complaint alleging a breach by the employer of the Board's access order dated June 27, 1995, and a further breach of the Code with respect to the employer's distribution of anti-union literature. On December 12, 1995, the parties appeared before the Board in



Edmonton. On December 19, 1995, confirming an agreement between the parties, the Board directed the employer to provide two mail-outs of union material to all Echo Bay's Lupin employees: (see Echo Bay Mines Ltd. (1995), File no. 745-5159).

Echo Bay Mines Ltd. (1996), as yet unreported CLRB decision no. 1169, relates to the present section 24 application. The employer refused to provide the Board's Registrar with its employee list and other information relevant to the Board's investigation of the certification application. As a consequence, the Board was compelled to convene a full hearing in Ottawa to deal with the employer's refusal and to order the production of the same.

In addition to those arising from the above past applications, the following general facts relating to the employer's conduct, emerged from the current hearing.

1. Shortly after the union organizing drive began, the Mine Manager, Jerry McCrank, issued "union report sheets" (Exhibits 35, 62, 85 and 86) to each of his supervisory employees. Each of the supervisors were to complete the sheets on a daily basis and return them to McCrank. Supervisory personnel were required to report on any discussions they had with any employee regarding trade unions or the Steelworkers organizing campaign.

The format of the sheets, and their contents are set forth below:

☐ *I did not discuss trade unions or the Steelworkers' organizing campaign with any employees today.*

☐ *I discussed trade unions or the Steelworkers' organizing campaign with an employee or employees today. Here are the details:*

*Who:*

---

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*When:*

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*Where:*

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*What:*

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\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Printed Name*

*Give completed form to General Manager"*

The rationale given by McCrank for the "report sheets" was that he wished to remain apprised of their activities and conversations to ensure that the supervisors were not somehow breaching the Code in their discussions or actions. If he determined, after reading a report, that a supervisor had given improper advice or acted contrary to the Code he could then speak to the employee to rectify the situation. Simply put, we do not accept this explanation for the existence of the sheets or the conduct of the supervisors in completing them. The purpose, in our

view, was obvious and transparent: to ensure that all trade union activity was reported and acted upon. That the employer acted on information it received about an employee's support of the trade union is apparent from a review of its conduct with respect to Noah Perry.

2. In June 1995, Noah Perry, employed at Echo Bay since 1982 as a carpenter, was confronted by his supervisor who informed him that Hugh Ducasse, the Manager of Loss Control, had told him (the supervisor) that Perry was seen in the head frame (where employees congregate between shifts) signing up union members. Perry went to see Ducasse about that accusation. While admitting that he said it, Ducasse advised that it was simply a rumour and that he would inform the Assistant Mine Manager, Bill Burton, that the rumour was not true.

A similar accusation had been made about Perry's co-worker, Kevin Mealy, who thereupon asked McCrank to meet with 5 or 6 employees, that included the carpenters, to explain the "dos and don'ts of the union drive." On his arrival, McCrank told Perry that he had been told by various people at various times that Perry had signed a union card. At the meeting which followed, McCrank invited any employee to come and see him, in private if they wished, if they had any questions. As McCrank was leaving, Perry asked to see him in private. McCrank agreed and they subsequently met in his office. At this meeting Perry admitted that he had signed a union card, that he was afraid for his job as a result, and asked McCrank if there was a way to get his card back. McCrank said he would contact him the following day.

When he met with McCrank the next day, Perry was given a document (Exhibit 71) - that was made available to all Lupin employees - which provided detailed instructions on how to go about revoking one's union membership. The document is set forth below:

"

*MEMO*

*ECHO BAY MINES LTD.*

*Date: \_\_\_\_\_, 1995*

*To: \_\_\_\_\_*

*From: Supervisor \_\_\_\_\_*

---

*You have asked how a person who has signed a United Steelworker's of America Union membership card can resign from membership in the Union or 'turn in' his card so that he ceases to become a member of the Union.*

*The Canada Labour Relations Board has told us that in order to 'turn in' a card or resign from membership in a Union, the following must occur:*

- 1. A person must write the Union and tell them that he no longer wishes to belong to the Union. The Union's address is:*

*United Steelworkers of America  
District Office  
#601, 686 W. Broadway Avenue  
Vancouver, B.C.  
V5Z 1G1*

- 2. A copy of the letter sent to the Union should also be sent to the Canada Labour Relations Board. The Board's address is:*

*Canada Labour Relations Board  
800 Burrard Street  
Vancouver, B.C.  
V6Z 2G7*

- 3. These letters should be sent by double registered mail so that there is a record that the Union and the Board received the letter.*



*We have been advised that for the purposes of determining whether a Union has enough employee support to certify the Union as bargaining agent for the employees, the Canada Labour Relations Board will only consider those resignations received prior to the Union's application for certification.*

*Should you have any questions or concerns, please speak to Jerry McCrank or Tim Butler. You may also wish to call the Canada Labour Relations Board at (604) 666-6001."*

McCrank invited Perry to use the company's fax machine to transmit his union withdrawal request. Perry prepared a letter of withdrawal consistent with the instructions provided, and thereafter returned to McCrank's office where McCrank's secretary faxed the withdrawal to the union's office.

### III

At the risk of over-simplification, the Board's focus, when deciding a complaint filed pursuant to section 94(3), is to ensure that anti-union animus was not a motivating factor in an employer's determination to discipline an employee. The employer may be found to have anti-union animus either generally or towards a specific employee:

*"... In order for there to have been a violation of section 184(3)(a), [now 94(3)(a)], one of the reasons for the dismissal must have been the union activities of the employees in general or the complainant in particular. This reason need not be the only one; it may be one of several reasons. ..."*

(Purolator Courier Limited (1982), 48 di 32 (CLRB no. 365), page 54)

The Board's approach when dealing with such complaints has been described in National Pagette (1991), 85 di 1 (CLRB no. 862):

*"When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to*

*dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from **Air Atlantic Limited** (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):*

*'The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:*

*"... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice."*

*(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)'*

*(pages 34-35; and 14,007; emphasis added)"*

*(page 9-10; emphasis added)*

When it evaluates the circumstances surrounding the imposition of discipline, the Board is careful to ensure that the employer does not use outwardly legitimate reasons as a pretext to dismiss an employee for the underlying reasons of trade union activity.

As stated by the Board in D.H.L. International Express Ltd. (1995), as yet unreported CLRB decision no. 1147:

*"...an employer is not prohibited by the Code from dismissing an employee for legitimate reasons, either before, during, or after, a union organizing campaign. Although on certain occasions the Board will review the reasons given by the employer for the dismissal to ensure that they are genuine and not a pretext for the firing, the Board's function is not to assess whether the reasons given constitute just cause for dismissal but rather to determine whether or not anti-union animus had any role to play in the same. See Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), where the Board discussed the concept of pretext vs. real cause:*

*'When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).*

*The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. ...'*

*(page 190; emphasis added; see also Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134))"*

Anti-union animus need only be a proximate cause for the decision to discipline in order for the impugned employer to be found in violation of section 94(3)(a)(i) of the Code. The existence of an anti-union animus in the mixture of motives underlying the decision to dismiss or terminate makes such dismissal or termination contrary to the Code. To safeguard the interests of employees, section 98(4) of the Code imposes a rebuttable presumption on the employer to show that the action taken by it was not motivated in any manner by anti-union animus. See Pierre Fiset (1985), 55 di 233; and 85 CLLC 16,041 (CLRB no. 473):

*"...Foremost, the employer must establish that, whether or not there was just cause, its action was not tainted by anti-union animus. The union must establish that there was anti-union animus, again whether or not there was just cause."*

(pages 242; and 14,268)

In the words of the Board in Provincial Bank of Canada, Jonquière (1979), 36 di 58 (CLRB no. 216):

*"... we must ask ourselves whether there is a cause-effect relationship between (the employee's) union activities and (his) dismissal."*

(page 61-62)

#### IV

We will deal initially with the unfair labour practice allegations and thereafter with the union's certification application and its request for a vote, pursuant to section 29(1) of the Code.



## NORM SMITH

Norm Smith, began his employment with Echo Bay on a part-time basis in 1982 and has been a full-time employee since 1985. To the knowledge of the employer, Smith has been one of the union's chief organizers at the Lupin mine site since the commencement of the organizing drive. In fact, following Smith's testimony before this Board, relative to the union's request for access to the Lupin site (file no. 800-33, supra), the employer circulated a circular to its employees which derisively referred to Smith. The Circular (Exhibit #30-20) warrants reproduction here:

### " *EMPLOYEE BULLETIN*

#### *What Are the Union Representatives Saying?*

*At the hearing in Edmonton to determine whether union representatives could have access to Lupin, Gilles Deslauriers, the paid union organizer from Montreal, said there are many 'transient' people working in the mining industry and that this makes it hard to contact them away from Lupin.*

*Is this so?*

*Are you a transient?*

*Norm Smith also testified at the access hearing for the union. He said that he needs Gilles Deslauriers with him at Lupin when he speaks to Echo Bay employees about joining the union because:*

- *Norm gives Echo Bay employees wrong information*
- *Norm doesn't know the answers to employee questions about the union, and*
- *Norm does not have any authority to make commitments on behalf of the union.*

*Please don't ask Norm any hard questions about the union!*

*How does that make those of you who signed cards because of what Norm told you feel?"*

The circumstances surrounding Smith's dismissal are, for the most, relatively undisputed.

A Wagner ST 60 Scoop (Unit #68) developed an oil leak on the late shift on March 23, 1996. The scoop was brought in to the mechanical repair shop on level 1130. Walter Wauhkonen, a Heavy Duty Mechanic, was the first person who dealt with the repair of unit #68. When he initially saw it, the scoop had a "severe oil leak". He used a pressure washer to remove sufficient oil in order to diagnose the problem as a leaking oil cooler. He removed it and sent the cooler up to the main shop at the 650 level for repairs.

On the next shift, Brian Preston, another Heavy Duty Mechanic, installed a new oil cooler on unit #68. When he began working on the scoop, it was covered "pretty heavy" with oil. After he finished his repairs, Preston sprayed the engine with de-greaser and then pressure washed it "as best he could". Preston initially testified that his pressure washing of the scoop left it "pretty clean" leaving merely a "bath tub like residue" that could not be removed without a steam cleaner. However, later in his testimony, he told us that he instructed an operator to tag the scoop and take it up to level 650 to clean it so that: "there would be no danger of fire". According to Preston, the scoop was good enough to go up to level 650 but not to go into full use.

It was apparent that notwithstanding its repair and pressure washing, the scoop remained covered with residual oil and required steam cleaning. The mine has only one steam cleaner located at its main repair shop on the 650 level.

Smith reported for work at 5:30 p.m. on March 24, 1996. Mr. Jerry Pietruszka, the Mine Shift Boss, assigned him to unit #68 and instructed him to drive the scoop from the mine's 1130 level to the 650 level where it was to be steam cleaned. Smith attended at the 1130 level and was

assisted there by Wauhkonen in preparing the scoop for transfer to the 650 level. Wauhkonen drove the scoop into the repair area at the 1130 level and began to pressure wash it. When he had to leave, Wauhkonen left Smith washing the scoop. After he finished washing the unit, Smith set off to drive it to level 650.

Wauhkonen testified that, considering the oil residue left on the scoop, he expected it to smoke for 5 minutes or so at the outset of Smith's drive. However, he did not tell that to Smith. In fact, no one told Smith how long or how vigorously the scoop would smoke. For his part, Smith also expected the scoop to smoke. Although he indicated he would stop if the machine smoked more than he anticipated, he nevertheless believed it would smoke "all the way up to 650." It did not disappoint him. The scoop began to smoke shortly after he began his ascent up the ramp to level 650. As he progressed, the amount of smoke appeared to him to remain consistent. He arrived at level 650 approximately 45 minutes later and parked the scoop in the steam bay. At this point, he noticed that the engine had an oil leak and reported it to Dennis Donovan, the Mechanic at level 650. Donovan testified that when he first saw the scoop in the steam bay, the bay and the drift were filled with a "fair bit" of smoke.

By this time Smith had developed a headache from the smoke and telephoned Pietruszka to advise him that he was headed up to the surface because of it. Smith went up and saw the nurse who gave him medication and instructed him to go to bed.

The next morning, March 25, 1996, he met Pietruszka at breakfast. Pietruszka told him that he would only be paid for 2 hours work for the previous shift. Smith advised that he would apply for workers' compensation if necessary. Pietruszka did not mention anything else about the incident.

When he reported to work at the 5:30 shift that evening, Smith was instructed by Pietruszka to go to the 1130 level lunchroom and wait for him. Pietruszka came into the lunchroom and began to interrogate Smith about the events surrounding the smoking scoop. He advised Smith that his actions had endangered his own and all the miners' lives and that he was being suspended from driving any equipment pending the completion of an investigation. Smith told

him he was unable to work because of the consequent stress the situation presented for him, returned to the surface and reported his state to the nurse. As well, he provided her with a report of the incident for safety report purposes.

On March 27, 1996 he was awakened and told to see Mr. Aidan O'Toole, the Mine Superintendent at the loss control office. When he arrived, O'Toole told Smith, in the presence of Mr. Murray Grayson, the Underground Maintenance Foreman, that what Smith did with regard to the scoop was unsafe and endangered his life and the lives of others and that therefore he was fired immediately.

Smith accordingly left on the plane later that morning. When he de-boarded the flight, he was met in the hangar by Tim Butler, Echo Bay's Manager of Human Resources. Butler, in full view of all of the other Echo Bay employees in the hangar, handed Smith an envelope that contained his letter of termination.

There is no need to examine the evidence in further detail to point out those aspects of the employer's conduct, and the discrepancies in its explanations, which indicate that its disciplinary action toward Smith was motivated by anti-union animus. It suffices to say that the evidence on the whole convinces us of that fact beyond any doubt. For our purposes, as an example, it is sufficient to focus on just two factors: the first is the incident, just described, relating to the letter of termination; the second, relates to the comparative fashion in which others who were involved in actually causing fires at Echo Bay were treated by the employer.

The conduct of Butler is significant for two reasons: first, Norm Smith had already been unequivocally terminated by O'Toole, and second, the termination letter which Butler provided to Smith when he de-boarded, lacked the severance pay and remaining documents that would normally be included. In fact, Smith had to personally pick up the remaining documents from Butler at Echo Bay's offices the following day. Considering the circumstances and the employer's knowledge of Norm Smith's involvement with the union organizing drive (see Exhibit 30-20), we conclude that Butler's presence at the hangar to provide Smith with his letter



of termination was designed to make an example of Smith to his fellow employees and thereby discourage them from participating in the union.

With respect to the second factor, Aidan O'Toole testified that he was first made aware of the smoking scoop incident at the shift change at 9:30 a.m. on March 25, 1996 when Bill Danyluk, the Mine Captain, told him that Norm Smith had left his work area due to a headache he developed as a result of driving the smoking scoop. Danyluk told him then that Pietruszka was investigating the matter (this notwithstanding the fact that Pietruszka said nothing of an investigation when he saw Smith at breakfast earlier that morning). O'Toole waited until 6:00 p.m. to speak with Pietruszka about the incident. According to his testimony, he then told Pietruszka to investigate it. The following day he received Pietruszka's report as well as a report from Grayson regarding his conversations with the mechanics involved. In spite of the fact that Smith was the only person with any knowledge of what occurred over the 45-minute period that he drove the scoop, O'Toole did not speak with him. That notwithstanding, after reviewing the information outlined above, O'Toole reached the conclusion that Smith's conduct in driving the smoking machine, put his own life and that of his crew shift in danger. He determined that it was a severe incident which recklessly endangered life contrary to Echo Bay policy (see: Exhibit 25), and he recommended Smith's termination to Jerry McCrank, the Mine Manager. When O'Toole advised Smith of his termination, Smith raised the issue of his union profile as being the cause of the decision to terminate. O'Toole denied it and assured him that the same consequences would ensue for any employee in similar circumstances.

In cross examination, O'Toole conceded that all fires at the mine, regardless of their magnitude, are regarded as serious - and understandably so. Bearing in mind that Smith's case did not involve an actual fire but rather a potential one, union's counsel took Mr. O'Toole through reports of 4 separate fire-related incidents at Echo Bay since 1991 (see: Exhibits 77, 78, 79, 80, 81). In each case fire resulted from the operation of a machine, and in each case an error in judgement by the operator appeared to be the root cause of the fire. In three of the four incidents which preceded Smith's no reprimand or suspension was imposed, much less a dismissal. In only one of those incidents, namely one of the two fires that were caused by Ray Lavoie, was a disciplinary measure of one week suspension meted out. Although O'Toole would

not agree with the categorization, it was nevertheless clear that all four fire-related incidents which preceded Smith's involved an error in judgement on the part of the operator. In one case particularly, that involving Mr. Rueger, the fire ignited as a result of a conscious decision by the operator to move the machine on the ramp to avoid traffic.

We do not dispute the employer's position that causing a fire, or creating an environment for a potential fire is serious and should be treated so from a disciplinary perspective. However, when we compare the manner in which the employer dealt with the 4 employees whose "error in judgement" actually caused a fire, with the dismissal of Smith, whose error in judgement only created a potential fire hazard, the disciplinary consequences are irreconcilable but for the additional fact of Smith's union organizing profile.

When we consider, inter alia: the employer's anti-union conduct described earlier; that Smith was, to the employer's knowledge, a union organizer; that the employer had circulated derisive comments about him in that regard (Exhibit 30-20); that Butler attended at the hangar to "fire" Smith a second time in the presence of other Lupin employees; and, that the discipline meted out to Smith was out of all proportion to that imposed on employees in similar circumstances, and we ask ourselves the question, as proposed in Provincial Bank of Canada, Jonquière, *supra*, whether there is a cause-effect relationship between Smith's union activities and his dismissal, we conclude that the answer is unequivocally yes.

Smith's complaint is therefore allowed pursuant to the terms set forth at the conclusion of this decision.

### **Margaret Crowley**

On September 28, 1995 the Board issued reasons for decision which found that the employer, in its dismissal of Margaret Crowley, breached sections 8, 94(1)(a), 94(3)(a)(i) and 96 of the Code. The Board ordered the immediate reinstatement of Crowley and the payment of appropriate wage loss and benefits as damages. See Echo Bay Mines Ltd. (1995), as yet

unreported CLRB decision no. 1140, appealed before the Federal Court on November 20, 1995 - File no. 760-110) and affirmed in Echo Bay Mines Ltd. v. United Steelworkers of America and Margaret Crowley, supra.

The employer, as indicated earlier, did not reinstate Crowley until December 8, 1995. In their testimony, both Jerry McCrank and Hugh Ducasse, the Manager of Loss Control, candidly admitted that one of the reasons the employer did not allow Crowley to return to the work place was because of her union activity.

When she finally returned to work, Crowley was summoned to Ducasse's office where she was met by Ducasse and Butler. Butler gave her a letter of suspension dated December 7, 1995 (Exhibit 51) which, inter alia, stated:

*"...The company is not prepared to overlook your misconduct and notifies you that it is suspending you for seven days without pay, which suspension you are deemed to have served."*

and provided for a one week suspension for the exact same conduct for which the employer had earlier dismissed her and for which the Board had ordered her reinstatement.

The employer sought to justify its suspension of Crowley on two fronts. First, Ducasse asserted that the employer did not agree with the Board's decision regarding Crowley. However, that notwithstanding he testified that the suspension imposed on Crowley was based on his interpretation of the Board's decision (#1140). Reference is made to the fact that: "...Certain comments in the letter could be considered insubordinate." Without attempting to interpret the Board's previous decision, it is clear that the language used cannot bear the perverse interpretation given it by the employer. Nor could the Board be understood to say that an employer's conduct in dismissing an employee, which is tainted by anti-union animus and thereby in breach of the Code, could nevertheless somehow be legitimized through the imposition of a less severe discipline.

Secondly, the employer attempted to argue that the issue of Crowley's suspension is moot insofar as the letter of suspension is simply of no effect, in that no actual money or time was lost by Crowley consequent upon the "suspension." As well, since one year had passed, the suspension, although remaining on her file, could not be referred to in any other disciplinary incident which might arise.

Nothing could be further from the point.

The employer's suspension of Crowley, in the present complaint, was based on the exact facts and circumstances, as well as the exact employer's conduct, that the Board had earlier determined in decision #1140 to be in breach of the Code. The employer cannot be heard to say that: "although we cannot enforce our dismissal of Ms. Crowley because of our anti-union animus, we nevertheless now wish to impose a lesser penalty of a suspension." Clearly, **any** disciplinary action taken against Ms. Crowley as a result of those circumstances related to her earlier dismissal is prohibited by the Code. The issue is not the severity of the penalty imposed, but rather that the imposition of the penalty, regardless of its severity, was motivated by anti-union animus. To draw an evidentiary analogy: in the present case, any such disciplinary action becomes fruit from the tree poisoned by the employer's proven anti-union animus.

The employer's conduct, as it relates to Crowley, is inexplicable from any sound labour relations perspective except that of outright anti-union animus towards Crowley and an attempt to purposively frustrate the earlier order of this Board. It is consistent with a course of action, as will be discussed later, designed to chill the organizing drive and send a message to all employees that notwithstanding the orders of the Canada Labour Relations Board, it is the employer who will determine the discipline to be imposed on its employees. The purposive nature of the employer's breach of the Code is perhaps the most apparent in its conduct with respect to Margaret Crowley.

Margaret Crowley's complaint is therefore allowed pursuant to the terms of the order set forth at the conclusion hereof.



## SCOTT RITCHIE

Scott Ritchie has been employed at Echo Bay since 1981. At the relevant times with which we are concerned, he worked in the "mill," being that part of Echo Bay's operation related to the grinding, crushing, leeching, filtration, and backfill process. As early as March 1995, the employer was aware that Ritchie was a union supporter.

On January 26, 1996, a shift change was due to take place. However, the airplane from Cambridge Bay was weathered out and could not land at Lupin. In an effort to compensate for the absence of employees, the supervisor in the mill for the morning shift, Mr. Mick Hewko, the Mill Shift Boss, attempted to make appropriate adjustments to continue the mill operation pending the arrival of the Cambridge Bay flight. At approximately 2 to 3 p.m. he became aware that the flight would not be coming in until the following day and realized that there was going to be an operator shortage in the mill, particularly with respect to the crusher. Hewko explained that the crusher had to operate to keep the fine ore bins sufficiently filled so that the successive shifts could continue the milling process. In an effort to ensure that there was sufficient ore crushed through the night shift, Hewko spoke with Scott Ritchie and Brent Proud, and requested that they work extra time to accommodate the crushing process. He arranged with Proud to work from 7:00 p.m. until 12:00 midnight, and another employee was to work from 2:00 a.m. to 7:00 a.m. the following morning. At approximately 3:30 p.m., he spoke with Scott Ritchie and asked him to leave the case backfill job he was working at and to go to the crusher. Ritchie went to the crusher area at 3:45 p.m. and, as Exhibit no. 61 indicates, began crushing at 4:00 p.m. Between 5:00 and 5:30, Hewko asked Ritchie if he would agree to work for an extra hour due to the Cambridge Bay flight delay. He agreed. Hewko admitted that he did not tell Ritchie that the shift would be a "hot change"; that is, where the crusher continues to run while one operator relieves the other. The evidence is equally clear that Ritchie never knew that the shift change was to be "hot." After he spoke to Ritchie, Hewko finished the balance of his shift and attended the daily shift exchange meeting with James Rappel, the Mill Superintendent, and Bill McCrank, another Mill Shift Boss.

Hewko testified that the meeting lasted until approximately 6:40 p.m. Thereafter he went into the "dry" (the area where employees change out of their work clothes and shower) where he saw Ritchie some time between 6:40 and 6:45. Rappel, who was with Hewko at the time, testified similarly concerning Ritchie's arrival in the dry. The only conversation he had with Ritchie at the time was to ask "Are you shut down?" To which Ritchie replied "Yes." Subsequently, in response to a question from Brent Proud, Ritchie indicated that the reason he shut down was that he "never had a coffee break all afternoon, supper ends at 7:00 p.m., and I had a short lunch."

Hewko testified that the crusher should not be shut down at shift end both because of the extensive cost involved (which he was unable to quantify), as well as the loss of approximately half an hour of work time. His testimony was that the practice and policy was to only shut down the crusher in three circumstances:

1. when the coarse ore bin is empty;
2. when the fine ore bin is full; or
3. finally, when there is a mechanical problem.

Otherwise, according to Hewko, the shift changes are "hot changes."

Hewko initially testified that his surprise and irritation at seeing Ritchie in the dry was because he realized that the crusher would have had to be shut down and that would mean that the cost and time loss he referred to would be incurred. Although Hewko professed to be extremely upset with the fact that Ritchie had shut down the crusher prior to being relieved by Brent Proud - a sentiment which Rappel, who was also in the dry at the time, shared - neither of them spoke about it when they met later that evening for dinner. The extent of their discussion was Rappel asking Hewko whether or not Scott was supposed to work until 7 o'clock and Hewko's affirmative reply. Following that, they simply agreed to discuss the matter further in the morning.

The following day, they called Ritchie in to Rappel's office at about 1:15 p.m. At the meeting, Ritchie gave his reasons for shutting down the crusher prior to 7 o'clock as being: the fact that he thought that supper ended at 7 p.m., that he had had no coffee break, that he had a short lunch, and that he understood it to be procedure to shut down at shift end. At this stage, Hewko stated that the practice was not to shut down the crusher except in one of the three circumstances referred to earlier. As he left the meeting with Rappel and Hewko, Ritchie, believing that what occurred was, at worst, a misunderstanding, apologized to both of them saying "I'm sorry to have disappointed you."

After Ritchie left, Rappel and Hewko made the determination that Ritchie should be given a written reprimand. Both of them understood that this would be his third reprimand within a one-year period and that consequently it would mean that his employment could be terminated pursuant to Echo Bay's policy.

The following day, on January 29, 1996, Hewko called Ritchie to his office. When Ritchie arrived, Rappel who was also present read Ritchie's reprimand to him (Exhibit 58). Ritchie asked for a copy, which was provided to him, and left.

It is interesting to note that Hewko and Rappel, prior to meeting with Ritchie on the day following the incident, decided to review the crushing charts to confirm the times at which they saw Ritchie in the dry. In point of fact, the graphic control crushing charts (Exhibit 61) indicate that the crusher was shut down at 6:45 p.m., which would have made it impossible for Ritchie to be in the dry when Hewko and Rappel believe they saw him. Faced with the time calculations on Exhibit 61 being inconsistent with their opinion that Ritchie was in the dry at 6:45, Hewko and Rappel factored in the appropriate adjustments to Exhibit 61 by subtracting 10 minutes from the time the electronic graph indicated the crusher stopped (being 6:45). This they did on the basis that Ritchie's handwritten report indicates that he arrived at the crusher at 3:50 p.m., while the electronic graph indicated that the crusher itself only began to operate at 4:00 p.m.. (Ritchie explained that he arrived at the crusher, signed in and did preliminary work and then started up the crusher as indicated on Exhibit 61). Subtracting that ten minute differentiation from the time at which the graphic chart indicates the crusher was shut down, namely 6:45, brought the shut

down time to 6:35. This calculation would allow the extra time for Ritchie to be in the dry at 6:45 when they say they saw him there.

All of this is questionable at best and was in our view a rationalization of the uncontroverted information on the graphic control chart to suit the timing that both Hewko and Rappel required to make their evidence consistent with the same. Inexplicably, the graphic chart appears to be correct in all other respects including the subsequent start-up time for Brent Proud at 7:15. However, we are asked to accept that the only time wrong on the chart, with respect to Ritchie or Proud, was the 6:45 period which, coincidentally, Ritchie also indicates on his hand-written report as the time he quit crushing.

There was clearly some doubt with respect to the time that Hewko and Rappel actually saw Ritchie in the dry. However, other than to show the inconsistencies in the evidence, the time when Ritchie was seen in the dry is academic insofar as he candidly admitted that he left work early. Ritchie's admission makes the entire exercise of establishing the "actual" time he was seen by Hewko and Rappel, through their rationalization of the graphic records, suspect in itself.

In any event, consequent upon the reprimand, Ritchie's case was discussed by the Mine Manager, Jerry McCrank, and Rappel. McCrank decided that in lieu of dismissing Ritchie - which Rappel was recommending - he would only demote Ritchie to an Operator II level and suspend him for two weeks. This he did on January 28, 1996. Consequent on this decision, Ritchie lost a month of salary and was demoted to a salary range which caused him a loss of pay of \$5 per hour. McCrank admitted that he had never demoted **and** suspended any employee before.

More importantly, there was no evidence that any employee had ever been disciplined before for the kind of transgression committed by Ritchie. In fact, Ritchie testified that he had previously been in the dry and showered with Hewko on many occasions before the shift ended and no mention was made of it.



We do not, of course, pass arbitral judgement on the sufficiency of an employer's reasons for discipline. Any review of the same is done solely for the purpose of understanding the motivation. As indicated in Transport Papineau Inc., (1990), 83 di 185 (CLRB no. 842):

*"The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. ..."*

(page 190)

What occurred here was clearly a misunderstanding between Ritchie and Hewko. Although Hewko fully intended the shift change with Proud and Ritchie to be a "hot change," by his own admission, he never communicated that to Ritchie. No doubt he was surprised to see Ritchie in the dry early that night. However, that was not because Ritchie left the shift "early" but rather because to Hewko it meant that the crusher was shut down and there would not, in fact, be a hot change as he had intended.

Although we do not take issue with the employer's right to institute and implement a policy that allows for dismissal or serious discipline where an employee commits three infractions within a single calendar year, we nevertheless were not satisfied, at the conclusion of the evidence, that Ritchie's conduct, in ordinary circumstances, would have been disciplinable at all. Ritchie never once resiled from the fact that he shut the crusher down "early" at 6:45. His point remained that it was normal to do that at the end of a shift change. The subsequent evidence of Hewko - when he was recalled to testify on the contents of crusher reports which the Board ordered be produced for the period November 1, 1995 to January 31, 1996 - clearly revealed that the crusher was regularly shut down prior to shift end when neither the course ore bin was empty or the fine ore bins were full.

Not surprisingly, from the time of Hewko's initial testimony to the conclusion of his cross-examination on the crushing reports referred to above, Hewko's justification for the

disciplinary measures against Ritchie had changed from shutting down the crusher early, and the consequent costs and time loss, to the simple fact that he had left work early.

Bearing in mind this change in the justification for the discipline in the first place, Rappel and Hewko's attempt to "rationalize" their recollection of the time at which they saw Ritchie in the dry with that of the electronic graph, the fact that no other hourly employee had ever been disciplined for circumstances similar to Ritchie's, and, finally, that McCrank had never demoted and suspended any employee before, we conclude that the discipline imposed on Ritchie - whose status as union supporter was well known to the employer - was simply a pretext to punish him for his participation in the trade union organizing campaign and to dissuade others from joining or becoming involved in the union.

Accordingly, the Board orders the reinstatement of Scott Ritchie pursuant to the terms of the order set forth at the conclusion of this decision.

## **PETER PERRY**

Echo Bay's employees who work at the Lupin mine come from Cambridge Bay, Copper Mine, Yellowknife and Edmonton. According to the agreement between Echo Bay and its employees, Echo Bay guarantees the transportation of all persons hired in any of these locations from that location to the Lupin mine. Perry was hired in Yellowknife. The employer accordingly had the obligation to arrange transportation for him. During the period relevant to this case, there were five employees living in Yellowknife. For some years prior to July 1996, four of the employees, including Perry's brother, were on one rotation and Perry was on the other. Accordingly, Echo Bay aircraft made scheduled stops in Yellowknife every two weeks to pick up or drop off the four employees. On the alternate weeks, scheduled stops were made to pick up and drop off Peter Perry.

Since 1991, Perry experienced some problems with a fellow employee who was physically harassing and threatening him. These problems were ongoing and there seemed to be no resolution in sight.

On June 6, while driving around the mine site, Jerry McCrank was stopped by Perry who said that he wished to speak with him. McCrank invited Perry to drive with him as they talked. This meeting took 15 to 20 minutes and focused on the problems Perry was having with various employees. Perry mentioned that fellow employees were accusing him of "trying to screw the company." Although Perry believed that the accusation was made because of his union support, he did not disclose that to McCrank. Perry indicated he would prefer to be on the same shift as his brother Noah. This change in shift would remove him from the same shift as the employee who had been physically harassing him. It was agreed that efforts would be made to accommodate him in this regard.

As a result of that conversation, McCrank arranged for Perry to be moved to his brother's shift. Consequently, all employees who lived in Yellowknife now worked on the same shift. Perry's move was considered a plus for the Company. There was only one scheduled stop in Yellowknife rather than two to accommodate Perry.

On June 8, 1996 Perry met Tim Butler. He complained to Butler that he was being harassed and that his locker had been broken into. According to Perry, Butler told him to "come into my office, sign a piece of paper, and your troubles will be over." Perry testified that he took this to mean that if he went to the office and revoked his union membership, the employer would solve his problems. Perry also explained that he was aware that the employer was helping employees revoke their union membership. According to Perry, it was common knowledge that if employees told management that they had signed a union card, management would have them sign a piece of paper and "it (the revocation of the union membership) would be looked after." This of course is similar to the experience which Noah Perry related to the Board.

Butler acknowledged that the meeting with Perry took place but denied that a discussion surrounding the "signing (of) a piece of paper" occurred. Notwithstanding the examination and cross-examination of both Perry and Butler, we are unable to conclude that the version of one or the other is to be preferred with respect to this aspect of the evidence.

On August 12, following the change in shifts, Peter Perry put in a request for holidays for the period of December 22 to 29, 1995. He was informed by an office employee that there would be no scheduled flight for him to return on the 29 because the consolidation of all Yellowknife employees had allowed a cancellation of this flight. Perry first spoke to his immediate supervisor concerning his problem. The supervisor agreed to speak with McCrank about it. In early September, McCrank ran into Perry and said he would figure out something to facilitate his return to the site. Whenever Perry returned to the site, he enquired as to the arrangements for his return; on each occasion he was told that it would be looked after. In early December, he spoke to Butler who initially seemed not to understand the problem; however, after some discussion, Butler assured him that something would be done.

The employer denied that anti-union animus had anything to do with its treatment of Perry. It essentially took the position that it was simply not economically feasible to fly to Yellowknife in order to pick up a single employee. The employer argued that it had numerous unscheduled supply flights to Yellowknife and it was its intention to accommodate Perry by having him return on one of those flights. However, when Perry left for his vacation, he was advised that there was no flight available on his return date. In fact, it was suggested that he make himself available to fly out of Edmonton.

On December 27, 1995, while he was at home, Perry received a call informing him of an unscheduled Echo Bay supply flight that was to leave Yellowknife on the 28. He was told to call the hangar and arrange to be on it. This he did and returned to Lupin on the 28 to start work on the 29. As a consequence, Perry had to give up a day of his vacation to return to Lupin.

According to Perry's complaint to the Board, the employer had refused to arrange a flight to bring him to the mine site at the end of his vacation because of anti-union animus.

Lupin employees are entitled to three weeks' vacation a year. Although the employer had provided "weekly" flights to Yellowknife for a number of years, to accommodate Peter Perry's presence at Lupin, following Perry's meeting with McCrank, the Yellowknife flights were



scheduled every two weeks. At first glance, the employer's reasons for refusing to schedule a flight to accommodate Perry appear reasonable. However, if the employer's rationale were accepted, it would in effect mean that no employee, who worked out of Yellowknife, could exercise his right to take a three-week vacation without risking the loss of a day or two in order to fly back to Lupin, at the employer's convenience, to commence his next shift.

Although, as indicated, the employer's reasons for its refusal appear reasonable enough, they must be weighed against its conduct viewed in the entire context of the organizing drive. From the inception of the organizing campaign, the employer's conduct has been rife with anti-union animus as other parts of this decision disclose. We are therefore justifiably circumspect in assessing its motives. As the Board stated in Gardewine and Sons Limited (1981), 45 di 124; and 81 CLLC 16,135 (CLRB no. 328):

*"Any alleged improper employer action which coincides with union activity and in particular organizational campaigns, will be scrutinized very closely by the Board. Not only must they come before the Board with 'clean hands', they must be 'squeaky clean'. The least inference that actions by any employer are designed to counteract or have been in any way motivated or affected by employees having opted to exercise their rights under the Code to participate in collective bargaining, will result in a finding of a violation and appropriate remedial steps shall be taken."*

(pages 130; and 907)

As the Board further observed in that case:

*"... Our experience shows that employers who have taken genuine actions which have unfortunately or unavoidably coincided with union activity have little or no problem discharging the onus under section 188(3) by relying on the merits of those actions. In fact, well-intentioned trade unions seldom bring such matters to the Board after evaluating the circumstances."*

(pages 131; and 907)

Weighing all the evidence, the Board must decide at the conclusion of the case, whether in the circumstances, the employer met the burden imposed upon it. Where the employer is unable,

on balance, to prove that anti-union animus had no role to play in its impugned decision, it will not have met the onus imposed upon it by section 98(4) of the Code. This is so, even if the Board is simply unable to decide, as here, which version - the union's or the employer's - to accept. In such a case, the argument of the employer, being the party with whom the burden of proof rests, must fail. In Carbec Inc. (1985), 62 di 127 (CLRB no. 528), the Board emphasized:

*"In the final analysis, the complaint hinges on this conversation and, as counsel for the employer acknowledged, it is essentially a matter of weighing the testimony. Were the Board to accept Malouin's version, then clearly this statement evokes both disciplinary considerations and anti-union animus, and the consequences for the employer are clear. If, however, we accept Sirard's version, the consequences will obviously be different. After weighing this testimony, the Board is still unable to decide which of these two versions it should accept. However, it must decide. Consequently, having regard to the evidence as a whole, the Board concludes that the argument of the party with whom the burden of proof rested must fail. The Code is clear: the onus of proof is on the employer. The employer's argument must therefore fail because it did not discharge this burden. Accordingly, the complaint is allowed."*

(page 134; emphasis added)

The employer's initial explanation must be weighed in light of its clearly exhibited anti-union animus since the commencement of the organizing drive, the coincidence of Perry's travel difficulties with his commitment to the organizing drive, the employer's knowledge of his support for the union, the fact that the employer previously arranged flights for Perry alone and, finally, the lack of an explanation, considering its larger transportation obligations, for its failure to meet its commitment to accommodate Perry with respect to his return to the site following his vacation.

Considering the above, the employer has not convinced us that its conduct toward Perry was not motivated, in part, by anti-union animus. At best, after weighing all the evidence, we are left with the conclusion that it is equally as possible that anti-union animus had a role to play as not. In such circumstances, the case of the party with the burden, namely the employer, must fail.

Accordingly, by decision of a majority of the Board, Peter Perry's complaint is allowed.

## SECTION 24 APPLICATION

The confidential officer's report reflects that the union has not signed up a sufficient complement of employees to require a vote pursuant to section 29(2) of the Code. The only issue before us is whether or not, in the circumstances, the Board should exercise its discretion and order a vote pursuant to section 29(1).

The union contends that the actions of the employer since the organizing drive began have deprived it of majority support in the unit. It argues that the Board should review the employer's behaviour both since the commencement of the organizing drive and in the present unfair labour practice complaints, and come to the conclusion that its conduct was designed to chill, or at a minimum had the effect of chilling, the organizing drive to the extent that a representational vote is necessary for the purpose of satisfying the Board as to whether the employees in the unit wish to have the Steelworkers represent them as their bargaining agent.

Section 29(1) of the Code provides that the Board may order a vote in any case to satisfy itself of majority support pursuant to section 28(c) of the Code:

*"29.(1) The Board may, **in any case**, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit."*

(emphasis added)

Although broad, this discretion has been limited by Board decisions over the years to particular situations recognized in the recent plenary decision of Atomic Transportation System Inc. (1995), as yet unreported decision no. 1137. As pointed out in the decision, an alleged unfair

labour practice is one of the particular circumstances which may justify the ordering of a vote pursuant to section 29(1) of the Code:

*"... With respect to the exercise of its discretion under section 29(1) of the Code, the Board has 'maintained that it would order representation votes only in special circumstances such as particular raid applications, **alleged unfair labour practices**, where it suspects that union membership evidence is tainted or irregular, and, very exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision' (Atomic Transportation System Inc., *supra*, at page 55). To summarize, as it was put at pages 56-57 of that decision, 'although the Board has the discretionary power under section 29(1) to order a representation vote even where the applicant union has demonstrated majority support, it has been the Board's long-standing practice and policy to exercise such discretion only where there are compelling reasons to question the reliability of the membership evidence' (Atomic Transportation System Inc., *supra*, pages 56-57)."*

(pages 8-9)

The discretionary exception to order a vote where the employer has been involved in unfair labour practices has been referred to by the Board on another occasion in Canadian Imperial Bank of Commerce (Victory Square Branch) (1977), 25 di 355; [1978] 1 Can LRBR 132; and 78 CLLC 16,120 (CLRB no. 104). In that case, the Board exercised its discretion to order a vote in six branches, where membership support was less than 35%, because of particular factual circumstances in the period during which amendments to section 28(c) were adopted. Although the vote was not specifically ordered because of employer interference, the Board explained this exception as follows:

*"The Board's decision to order a representation vote under section 127(1) is an exercise of the Board's jurisdiction to order a vote 'in any case'. It is the exception rather than the rule that the Board orders a vote when the applicant union has less than thirty-five percent. It would be far more likely the Board would order a vote under section 127(1) when the union has submitted evidence of majority support, but representations to the Board or our investigation casts some doubt on the membership evidence. Although the Code contains no threshold requirement for union membership support to file an application, if the applicant has less than thirty-five percent on the date of application, in a unit found to be appropriate, the Board usually dismisses the applicant. ..."*



*... We follow this practice for three reasons. ... Thirdly, and most importantly, in the interest of employees, employers, and the administrative convenience of the Board we do not wish to countenance frivolous applications...*

*Of course there are exceptions to this practice. The obvious one is when the employer interferes in the employees' free exercise of their right to join or support an applicant. If that interference makes it impossible to solicit thirty-five percent, the Board may order a vote to ascertain the true wishes of the employees. This protects the freedoms granted to employees and discourages unlawful employer activity. It prevents an employer from benefiting from its wrong doing. ..."*

(pages 373-374; 146-147; and 324-325; emphasis added)

The union argues that the circumstances set forth above should lead us to the conclusion that the employer has resisted and frustrated the union's organizing drive from the outset. We agree. In our view, the conduct of the employer, taken as a whole, has been so purposively intimidating and frustrating as to put a pervasive and effective chill on the union's organizing drive. Any fair and reasonable attempt at organizing the employees at Echo Bay has been thwarted by the deliberate action of the employer.

In circumstances where the actions of the employer effectively chill the organizing drive and either directly or indirectly intimidate or discourage employees from the free exercise of their choice to belong to a union, the exercise of the Board's discretion under section 29(1) is not only justified but necessary for the Board to carry out its obligations pursuant to section 28(c).

Accordingly we order that a vote, pursuant to section 29(1) of the Code, be conducted pursuant to the terms of the order set forth below.

## **REMEDY**

The employer's purposive conduct throughout has chilled the organizing campaign and cannot go without remedial consequences. In Royal Oak Mines Inc. v. Canada (Labour Relations

Board), [1996] 1 R.C.S. 369 (F.C.A.). The Supreme Court of Canada, per Cory, J, with whom the majority of the Court concurred, wrote as follows:

*"The breadth of the remedial section gives a clear indication that it was the intention of Parliament that the Board should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront. It is noteworthy that the section was amended in 1978. Prior to that date, the Code allowed the Board to impose only those remedies which were specifically enumerated. Section 189 (now s. 99(2)) was added in 1978. This provision authorizes the Board to make orders based on the principles of equity. The section now gives the Board both the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the Code and to fulfil its purposes and objectives. The granting of such a broad discretion to the Board demonstrates that Parliament wished the courts to defer to the Board's experience and expertise in making remedial orders so long as they were not patently unreasonable."*

(at page 408)

In National Bank of Canada v. Retail Clerks' union, [1984] 1 S.C.R. 269, Chouinard J. observes:

*"The fact remains that a remedy ordered pursuant to s. 189 must be one authorized by that section. In my view, it is essential for there to be a relation between the unfair practice, its consequences and the remedy."*

*In Re Tandy Electronics Ltd., supra, Cory J. wrote for the Divisional Court, at p. 215:*

*'So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.'*

*In that case, after finding that the employer had failed to bargain in good faith and had in many ways impeded the progress of negotiations, in addition to various remedies seeking to correct the situation, the Board had inter alia ordered the employer to pay the union as damages all costs incurred by the latter for the purpose of negotiations up to the date of the Board's decision, and all extraordinary costs of organizing bargaining units both of part-time and of full-time employees, and to pay all employees in the bargaining unit all monetary losses incurred as a result of the fact that a collective*

*agreement was not negotiated earlier. It is this part of the order regarding damages that is referred to by Cory J. in the above-cited passage.*

*In Westinghouse Canada Inc. v. United Electrical, Radio and Machine Workers of America, Local 504, 80 CLLC 295, an employer had been found guilty of unfair practices as a result of its decision to move its plant, in part for anti-union reasons. The Board ordered the employer not only to offer employees the option of employment in the new factory, but also to facilitate access by the union to employees in the new plant and to reimburse its reorganization expenses. At page 299, it was held:*

*'It is agreed that the order must be within the scope and intent of the Act and must be compensatory and not punitive in nature.'*

*And a little further on:*

*'It seems to us that the Board was attempting, having found the move to Alliston to be in part motivated by anti-union animus, to put the employees and the Union as much as possible in the same position as if the move had not been made or, as submitted by counsel for the Board, to restore the status quo.'*"

(pages 288-290; emphasis added)

The union has expended time and expense in carrying on the campaign which the employer has resisted and frustrated from the outset and effectively chilled. Consequently, much of the cost of the union's organizing campaign has been effectively "wasted" due to the unfair labour practises of the employer. This waste of expenditure is no more graphic than in the expenses that the union had to pay to the employer to attend at the Lupin mine site, pursuant to Board orders, for the purposes of its organizing campaign. It is only reasonable therefore, in the circumstances, (as was done in The Chase Manhattan Bank of Canada (1986), 64 di 1 (CLRB no. 549)) that the employer reimburse the union for all of the costs of transportation, sleeping accommodation and meals incurred by the union as a result of its representatives attendances at the Lupin mine site, and pursuant to the terms of the order set forth below, we so direct.

A similar casual relationship exists in the present case between the employer's unfair labour practice, its consequences and the remedy provided below with respect to the union's representational costs to prosecute the present complaints. Although the Board does not ordinarily require the employer to reimburse the union for its representational costs in unfair

labour practice complaints, it has done so exceptionally in the past (see: National Mobile Radio Communications Inc. (1989) 79 di 11 (CLRB no. 765)) and will continue to do so in circumstances, as is the case here, where the employer's conduct is repeated and purposive.

The repetitious, egregious and intentional conduct of the Employer which is in clear breach of the Code, has compelled the union to file and prosecute repeated complaints before this Board. The Employer's conduct, particularly in the Crowley matter, cannot be countenanced and must be unequivocally rebuked. In the circumstances, the Union ought not to be required to absorb the costs of the employer's purposive breaches of the Code; those should be borne by the employer, and pursuant to the terms of the order set forth below, we so direct.

## **ORDER**

1. The employer, and persons acting on behalf of the employer, are hereby ordered to cease and desist interference with the formation and administration of the union and interference with the representation of employees by the union.

2. **NORM SMITH**

Pursuant to section 99 the Board hereby orders the employer to:

- a) reinstate Norm Smith to the next shift change on which he would normally be returning to the job site;
- b) pay to Norm Smith forthwith compensation for lost wages and benefits, including bonuses, equivalent to that which he would have been earning between the date of his dismissal and the date of his reinstatement;
- c) reimburse the union for all reasonable costs incurred for the services of its counsel in the representation of Smith's case before this Board.

3. **MARGARET CROWLEY**



3. **MARGARET CROWLEY**

Pursuant to section 99, the Board hereby orders the employer to:

- a) Forthwith revoke any suspension imposed on Ms. Crowley pursuant to the terms of a letter provided to her by the employer on the 7th day of December, 1995;
- b) remove from any employer file any and all reference to said suspension;
- c) provide a letter of apology to Ms. Crowley for the imposition of the improper and illegal suspension and to confirm therein that the said suspension has been removed from her file and that no reference shall be made to the same, for any purposes whatsoever, on her employment record.
- c) reimburse the union for all reasonable costs incurred for the services of its counsel in representing Ms. Crowley before the Board in the present matter.

4. **SCOTT RITCHIE**

Pursuant to section 99 the Board hereby orders the employer to:

- a) revoke for all purposes the demotion and suspension imposed on Scott Ritchie on January 28, 1996;
- b) reinstate Scott Ritchie to his previous position at an Operator 5 level at the next shift change on which he would normally be returning to the job site;
- c) pay to Scott Ritchie forthwith compensation for lost wages and benefits equivalent to that which he would have received had it not been for the unlawful demotion and suspension;

- d) reimburse the union for all reasonable costs incurred for the services of its counsel in the representation of Ritchie's case before this Board.

## 5. PETER PERRY

Pursuant to section 99 the Board hereby orders the employer to:

- a) pay to Peter Perry forthwith compensation in wages and benefits for the holiday time lost by Perry in returning to the Lupin mine site prior to the completion of his holiday.
- b) reimburse the union for all reasonable costs incurred for the services of its counsel in the representation of Perry's case before this Board;

## 6. CERTIFICATION APPLICATION:

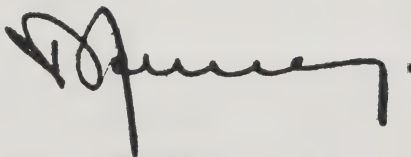
Pursuant to section 29(1), the Board hereby orders

- a) that a representational vote shall be conducted of the employees in the following unit:

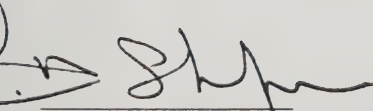
*"all employees, including the nurses, of Echo Bay Mines Ltd. located approximately 300 miles north of the City of Yellowknife, Northwest Territories, save and except Forepersons and Shifters and persons above the rank of Forepersons and Shifters, office, clerical, technical staff, surveyors, weatherpersons, and professional engineers operating in a professional capacity."*

- b) That the said vote, ordered by the Board above, shall not take place until such time as the employer has fully complied with the preceding provisions of this Order relating to Norm Smith, Margaret Crowley, and Scott Ritchie and Peter Perry;

7. The employer shall reimburse the union for all the costs of transportation, sleeping accommodation, and meals incurred by the union as a result of its representatives attendances, pursuant to the Board's orders, at the Lupin mine site.
8. The employer shall post a copy of this decision on all bulletin boards at the job site at Lupin within five days of receipt of the same.
9. The employer shall send a copy of this decision by mail to each and every employee, as well as members of management, within ten days of receiving this decision; proof of having done so shall be submitted to the Board's Labour Relations Officer named below.
10. The Board appoints Mr. Ron O'Hara, Senior Labour Relations Officer in Vancouver, to assist the parties in implementing the foregoing orders.
11. The Board shall remain seized of these matters in order to determine any questions that may arise with respect to the foregoing orders, and the implementation of the same, and to issue such formal orders as required.



Richard I. Hornung, Q.C.  
Vice-Chair



Patrick H. Shafer  
Member



Roza Aronovitch  
Member





# information

Publications

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## Summary

Alan Kucher, *complainant*, and Canadian National Railway Company, *respondent*.

Board File: 950-322  
CLR/CCRT Decision no. 1180  
August 23, 1996



## Résumé

Alan Kucher, *plaignant*, et Compagnie des chemins de fer nationaux du Canada, *intimée*.

Dossier du Conseil: 950-322  
CLR/CCRT Décision n° 1180  
le 23 août 1996

Complaint pursuant to section 133 of the Canada Labour Code (Part II - Occupational Safety and Health), alleging violation of section 147 of the Code.

A machinist working for CN refused to work with a fellow employee on the grounds that he found it unsafe to do so. After investigation, CN determined that the complainant had refused to work without justifiable cause and assessed him 15 demerit points.

The complaint was dismissed. The Board found that the complainant had no reasonable cause to believe that a danger existed. The alleged danger is clearly not one that Part II was intended to cover since by its very nature the risk alleged is inherent in the complainant's normal conditions of work. Furthermore, in the circumstances of the present case, the objective part of the test was not met since the danger alleged was at best only a remote possibility, as there was no evidence of wrongdoing on the part of his fellow employee. In fact, there could be none as the refusal took place even before any work had started.

Plainte fondée sur l'article 133 du Code canadien du travail (Partie II - Sécurité et santé au travail), alléguant violation de l'article 147 du Code.

Un machiniste au service du CN a refusé de travailler avec un autre employé parce que c'était, selon lui, dangereux. Après une enquête, le CN a jugé que le plaignant avait refusé de travailler sans raison valable et lui a imposé 15 points de démerite.

La plainte est rejetée. Le Conseil conclut que le plaignant n'avait pas de motif raisonnable de croire qu'un danger existait. Le danger allégué n'en était clairement pas un que la Partie II est censée couvrir, puisque de par sa nature le risque allégué est inhérent aux conditions de travail normales du plaignant. En outre, dans les circonstances de l'espèce, le volet objectif du test n'était pas satisfait étant donné que, dans le meilleur des cas, le danger allégué n'était qu'une vague possibilité puisqu'il n'y avait aucune preuve d'infraction par le collègue de travail en question. En fait, il ne pouvait y en avoir, le refus s'étant produit avant même que le travail n'ait débuté.

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## Reasons for decision

Alan Kucher,

*complainant,*

*and*

Canadian National Railway Company,

*respondent.*

Board File: 950-322

CLRB/CCRT Decision no. 1180

August 23, 1996

---

The Board was composed of Ms. Véronique L. Marleau, sitting as a single member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on February 13 and 14, 1996, at Vancouver.

### Appearances

Mr. John F. Burns, Local Chairperson District Lodge 280 Local 100 CAW Canada, for the complainant; and

Mr. Donald N. Kruk, Solicitor - CN, assisted by Mr. Brent J. Ballingal, Human Resources Officer - CN, for the respondent.

### I

The Board is seized of a complaint alleging that disciplinary action was imposed in violation of Part II of the Code. The complainant, Mr. Alan Kucher, has been working as a machinist for the Canadian National Railway Company (CN) since 1978. On July 26, 1995, he was assigned to work with a fellow machinist, but refused the assignment on the grounds that he considered it unsafe to work with that particular employee. After an investigation into the refusal, CN determined that the complainant had refused to work without justifiable cause and assessed him 15 demerit points. The complainant then turned to the Board, claiming that CN had breached section 147 of

the Code by disciplining him for exercising his right to refuse to perform unsafe work.

CN alleged that the complainant had never advised it that he was invoking Part II of the Code or contacted any member of the Safety and Health Committee as required under the Code. Furthermore, CN stated that the complainant, while saying that working with the employee in question was unsafe, had failed to identify any specifics in support of why he felt this to be the case.

The events following the complainant's refusal and which led to this complaint are set out in the Board's Labour Relations Officer's Report:

*"The complainant's refusal took place at the outset of his shift on the morning of July 26th. Following unsuccessful efforts to resolve the matter with his supervisor at the time, the complainant was sent home for the rest of the day. Later that same day he was recalled for work for the following day (July 27th) by the respondent. The complainant did report for work on July 27th and at the outset of his morning shift attempted to determine from the respondent whether he would be paid for the previous day and if any disciplinary action would be taken against him for his previous day's refusal. Before any determination on these matters could be arrived at the complainant advised the respondent in writing that he was too upset over the events of the past day to continue working and left the respondent's premises at approximately 8:30 a.m. that morning."*

(page 3)

## II

This issue is not new. In the past, Mr. Kucher has, on several occasions, refused to work with the employee in question (to whom we shall refer as "Mr. X"). CN was always able to accommodate the complainant without violating other employees' rights and the complainant's wage agreement rights. Consequently, Mr. Kucher was never forced to work with Mr. X until the July 26, 1995 incident.



On July 26, 1995, however, the circumstances were different. As the evidence revealed, it was vacation time at the Thornton Yard in Chilliwack, CN was short staffed, and as a result, only one track was in operation. Mr. X had volunteered to work at the site, not knowing that the complainant would be his workmate.

When the complainant found out that he would have to work with Mr. X, he went to speak with his supervisor, Mr. Jim Morgan to indicate that this would be a problem. Specifically, the complainant refused the assignment stating *"I refuse to work with Mr. [X], for safety reasons, some of which I have explained in the past, and some of which I have repeated to you now."* Mr. Morgan explained to Mr. Kucher the difficulties they were facing given the reduction in personnel. Nevertheless, he tried to accommodate the complainant's concerns by offering to have Mr. Kucher and Mr. X work on separate locomotives. This was not acceptable to Mr. Kucher who maintained that he had been consistently refusing to work with Mr. X for safety reasons. Mr. Morgan offered Mr. Kucher at least one other alternate working arrangement with Mr. X. He also requested input from Mr. Kucher as to possible solutions. Mr. Kucher suggested an arrangement that required splitting the consists by separating the air hoses and uncoupling so that he would work on one unit and Mr. X would work on another. This was not acceptable to Mr. Morgan, and other solutions could not be offered without violating other fellow employees' rights, disrupting the work place and creating unproductive time. Thus, when Mr. Kucher refused again to work with Mr. X, he could no longer be accommodated.

Mr. Kucher, who did not keep any record of the incidents alleged to have occurred with Mr. X, but who supplied a written version of the events giving rise to his refusal to work, stated repeatedly that his safety concerns were justifiable. At the hearing, he was asked to describe the safety reasons on which he had been relying to refuse to work with Mr. X. All he could come up with were one or two incidents dating back from his apprenticeship days in 1978, when he had worked under Mr. X's supervision. Mr. X was portrayed as unreliable and unpredictable, as having bad

working habits and not following standard procedure or listening to his co-worker's instructions. In the complainant's mind, Mr. X was unsafe to work with, and that was the end of it.

The complainant's description of the safety problem posed by Mr. X was much more revealing of a mind set constantly reinforced over the years, than of an actual problem verifiable by empirical evidence. There was no actual complaint of an incident creating a safety hazard; rather, there was a deep-seated fear that this employee was not a reliable mate because he would not follow safety procedures. The only thing that was documented, well known and recognized by the company for years was the complainant's consistency in refusing to work with Mr. X "*for safety reasons*"; not the reasons themselves. In the past, following one such refusal in 1993, the complainant had been informed by letter from Mr. W. Brown, Superintendent of the Mechanical Department, that "*it is the Company's position that Mr. [X], is a competent railroad machinist who is able to perform his duties in a manner fitting his chosen craft,*" and that, therefore, should a similar occurrence arise he would be required to work with Mr. X. Mr. Brown even met with the complainant at the time to discuss the content of the letter. Mr. Kucher had stated that he disagreed with his employer, viewing this as an opinion that did not remove his right to refuse to perform unsafe work as defined under the Code.

The Board heard the testimony of several witnesses, including past and present supervisors of Mr. Kucher and Mr. X. All stated unequivocally that they had never considered the complainant's problem to be safety related. For everyone, this was a problem that resulted from a personality conflict. The complainant himself could not deny that. In cross-examination, he admitted that he used to have a major personality conflict with Mr. X, that this conflict had started when he was an apprentice, and that it was much better now because he had hardly any contact with him.

### III

Section 128(1) of the Code gives employees who have reasonable cause to believe that a dangerous condition exists in any place the right to refuse work, and section 147 makes it an offense for an employer to penalize employees for exercising this right. An employee's right to complain of such breaches is set out in section 133(1) of the Code.

Pursuant to section 133(6) of the Code, an alleged contravention of section 147(a) by an employer is itself evidence that a contravention actually occurred; if the employer alleges that there was no contravention, it has the burden of proving this. In order to meet this onus, the employer must establish that the disciplinary action had nothing to do with the fact that the employee exercised his right to refuse under the Code, once the employee had satisfied the Board that he had a reasonable cause to believe that a dangerous condition existed.

The relevant sections of the Code provide:

*"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*

*(b) a condition exists in any place that constitutes a danger to the employee,*

*the employee may refuse to use or operate the machine or thing or to work in that place.*

*(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where*

*(a) the refusal puts the life, health or safety of another person directly in danger; or*

*(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment.*

...

*133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

...

*(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

...

*147.(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*

*(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,*

*(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or*

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."*



#### IV

The employer argued that Mr. Kucher's refusal was not and could not have been motivated by genuine safety concerns and that the motive for the refusal was linked to the ongoing personality conflict between the complainant and his allegedly unsafe fellow employee. Thus, CN asked the Board to dismiss the complaint on the grounds that the complainant had not exercised his right in good faith, as in William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332), where the Board stated:

*"An employee's right to refuse under section 82.1 must be used wisely and only in the true interests of safety. To abuse that right by coupling it to other interests such as to gain advantage in collective bargaining will, in the long term, defeat the purpose and attainment of the goals of Part IV of the Code. Improved safety and reduction of health hazards in the workplace through consultation and co-operation cannot be accomplished in an air of mistrust and adversity. Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board."*

(pages 189; and 248)

To have the protection of the Code, the refusal must be made in circumstances where there is "reasonable cause" for such a belief (see Bermiline Jolly (1992), 87 di 202; and 16 CLRBR (2d) 300 (CLRB no. 929)). The notion of reasonable cause entails both an objective and a subjective element (Francine Tremblay et al. (1985), 59 di 163 (CLRB no. 497)), as the Code does not confer a right of refusal based merely on "genuine belief." The danger must be acute and immediate and not merely stem from anticipation of stress because of interaction with fellow employees (see Antonio Almeida (1990), 82 di 10 (CLRB no. 819)).

The complaint before us is based on a refusal to work arising from the danger that a fellow employee allegedly creates solely by his presence in the work place. This, of

course, raises the issue of whether the danger or risk alleged is one that is intended to be covered by Part II of the Code. We think not.

As the Board stated in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686):

*"Not only must the risk of danger be immediate, it must also involve a hazard or condition that was intended to be covered by Part IV. ... For the purposes of these sections, which I believe are the only provisions in Part IV that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment [section 128(2)]. For example, a steeplejack could not refuse to work at heights because of a personal fear of heights. ... If, however, icy conditions prevailed, the steeplejack could refuse to work in those conditions and would receive the full protection of the Code. Another example of a source of danger that Part IV was never intended to cover is the potential for injury or illness caused by violence on a picket line (see Jackie T.R. Carr et al. (1988), 72 di 165; and CLRBR (NS) 125 (CLRB no. 668)). If Part IV permitted non-striking employees to refuse to work because of a fear of violence on picket lines, one of the cornerstones of Part V of the Code would be undermined. Employees who are not in a legal position to strike, vis-à-vis section 180 of the Code, could use the right to refuse to work under Part IV to do what they cannot lawfully do under Part V, i.e., to refuse to work in sympathy with the strikers. Further, striking employees would be encouraged to resort to violence while picketing to gain the support of those who are bound by the provisions of their collective agreement and by the Code to continue to work during the strike.*

*An example of a remote possibility of danger that is not intended to be interpreted as danger for the purposes of sections 85, 86 and 102(2) would be where a plant is located in the flight path of a busy airport. A safety officer would not be expected to issue a direction to close such a plant because of the potential risk of a plane crashing into the plant. Nor would the employees in the plant be expected to exercise their right to refuse under section 85(1) on the grounds that this hypothetical risk exists. A remote possibility of injury is not what the right to refuse under Part IV of the Code is all about."*

(pages 224-225)

The same reasoning applies here. The alleged danger is clearly not one that Part II was intended to cover; and in any event, in the circumstances of the present case, the objective part of the test was not met since there was no actual threat to safety.

On the one hand, the alleged danger was at best only a remote possibility, as there was no evidence of any wrongdoing on the part of the fellow worker. In fact, there could be none as the refusal took place before any work had started. In this regard, the matter at hand is different from the situation that prevailed in Rodney Noel (1986), 64 di 17 (CLRB no. 552), where the Board held that a pipefitter who had become aware of safety violations in a rail yard could refuse to work on the trains until such time as an investigation had been completed. In the present case, the evidence revealed no such violation.

On the other hand, by its very nature, the risk alleged is inherent in the complainant's normal conditions of work. It is as much a fact of life as it is a normal condition of employment sometimes to have to work with people against whom there may be some animosity, and where an aversion may develop. No matter how serious and real the conflict, this remains a human resources problem, not one of health and safety. Respect, trust and personal liking are not safety considerations, and doubting a fellow worker's abilities is no ground for refusing to work with that person. To use the right to refuse to work under Part II of the Code in this context is to do what cannot lawfully be done, i.e., to refuse to work for personal reasons when legitimate reasons for such refusal do not exist (such as specific allegations of harassment - and none were made here. Even if this had been so, this Board would have been the wrong forum and this complaint the wrong recourse). Employees who are not in a position to refuse a work assignment pursuant to the applicable collective agreement cannot use the right to refuse to work under Part II to do what they cannot lawfully do under that collective agreement, i.e., to interfere with their employer's right to manage its workforce and, more particularly, assign work and determine work standards, including safety. It would defeat all logic and basic common sense to allow employees to rely

on the provisions of Part II of the Code to refuse work assignments based on a subjective assessment of a fellow worker's ability to perform the tasks assigned.

Let us recall the situation that existed in Antonio Almeida, *supra*. That case involved a passenger service attendant who had refused to work on the grounds that perceived harassment, verbal abuse, discrimination and ostracism directed against him by fellow employees constituted a danger to his mental and physical health. The Board confirmed the safety officer's decision that these conditions did not constitute a "danger" within the meaning of the Code. The Board's rationale was as follows:

*"In the instant case, the danger perceived by the applicant stems from his anticipation of stress resulting from interaction with fellow employees. The work of a passenger service attendant (a position Mr. Almeida has held throughout his career in the railway industry) clearly requires frequent contacts with fellow employees and passengers. Further, that contact, of necessity, occurs in the relatively confined circumstances of on-board duty and, in the instant case, on-board duty extending to overnight runs.*

*If any danger were to be found in the circumstances of this case, it could, in the opinion of the Board, only result from interaction between the applicant and fellow employees, which in this particular case is a normal condition of employment."*

(Antonia Almeida, *supra*, page 16; emphasis added)

A parallel can also be drawn with Gerald Day (1994), 93 di 150 (CLRB no. 1048), where the Board held that in the absence of proof that the safety procedure in place (in that case, the blue flag system) was not generally enforced, the finding that there was no danger within the meaning of the Code was correct.

See also A. Patrick Gilmore (1994), 96 di 61 (CLRB no. 1096), where the Board determined that where there are rules designed to ensure safe operations and there is nothing to suggest that employees are not aware of them or that they are not appropriately enforced, the fact that there may be "inadequacies" of the system that



would surely decrease the efficiency of yard operations and increase somewhat the risks of potentially dangerous situations arising is insufficient to trigger a conclusion that a "danger" exists within the meaning of the Code.

Of course the question of whether there was "reasonable cause" to believe that a dangerous condition existed is a distinct one from the finding that there was no danger within the meaning of the Code (see A. Patrick Gilmore, *supra*). However, in our view, for the reasons set out above, Mr. Kucher did not have reasonable cause to believe that a dangerous situation existed. The problem at hand was one of personality conflict; it was clearly not safety related. Under the circumstances, the employee could not show that there existed a genuine safety concern for the refusal. To say this, of course, is not to infer that it is unreasonable to be wrong. Unquestionably, employees ought not be discouraged from raising suspicions or fears about danger in the work place (see David R. Holloway (1990), 83 di 50; and 14 CLRBR (2d) 293 (CLRB no. 835). In the instant case, however, as the Board found in A. Patrick Gilmore, *supra*, we find not only that Mr. Kucher was wrong in his belief that there was a danger in the circumstances, but also that his belief, however genuine, was one for which there was no reasonable cause.

## V

Having so found, there is no need to consider the second part of the test, namely, whether the employer could convince the Board that the employee was not disciplined because he refused to perform unsafe work, but rather because he behaved in a manner that warranted discipline, such as insubordination, as is alleged here. Indeed, the foregoing is, in itself, sufficient grounds to dismiss the complaint of violation of section 147(a) of the Code.

In any event, we mention in passing that in our view, the disciplinary action was not taken because the complainant had acted in accordance with Part II of the Code. In the instant case, CN disciplined the complainant only after having carried out an investigation into his refusal to work and concluded, based on objective facts, that the employee had behaved in an insubordinate manner by refusing a work assignment without a valid reason. Furthermore, the evidence establishes that this happened after the employer had gone to great lengths to accommodate the complainant's concerns over a period of several years for a problem that was never perceived or treated as anything other than a personality conflict.

For all the foregoing reasons, the complaint is dismissed.



---

Véronique L. Marleau  
Member

# information

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## Summary

Public Service Alliance of Canada, *complainant*, and Canadian Museum of Civilization Corporation and Joe Guerts, *respondents*.

Board File: 745-5022  
CLRB/CCRT Decision no. 1181  
September 30, 1996

The unfair labour practice complaint filed by the union alleges that the employer violated the collective agreement by proceeding with the lay-off of four employees.

In response to this complaint, the employer asked that the Board refuse, under section 98(3) of the Code, to hear the matter so it could be referred to arbitration.

When dealing with a matter pursuant to section 98(3) of the Code, the Board need not entertain the merits of the complaint.

The Board originally set out five criteria governing the exercise of its discretion under section 98(3) of the Code. Since complaints were rarely deferred to arbitration, the Board reassessed this practice and took the view that when there is a collective agreement, it should only deal with complaints that go beyond the scope of that collective agreement.

## Résumé

Alliance de la Fonction publique du Canada, *plaignante*, ainsi que Musée canadien des civilisations et Joe Guerts, *intimés*.

Dossier du Conseil: 745-5022  
CLRB/CCRT Décision n° 1181  
le 30 septembre 1996

La plainte de pratique déloyale de travail déposée par le syndicat allègue que l'employeur a enfreint la convention collective en mettant quatre employés à pied.

En réponse à cette plainte, l'employeur demande au Conseil, aux termes du paragraphe 98(3) du Code, de refuser d'instruire l'affaire pour qu'elle soit renvoyée à l'arbitrage.

Au moment de traiter une affaire aux termes du paragraphe 98(3) du Code, le Conseil n'a pas besoin d'examiner le bien-fondé de la plainte.

Au départ, le Conseil a élaboré cinq critères régissant l'exercice de son pouvoir discrétionnaire aux termes du paragraphe 98(3) du Code. Étant donné qu'on renvoyait rarement des plaintes à l'arbitrage, le Conseil a réexaminé cette pratique et est d'avis que, lorsqu'une convention collective existe, il ne doit s'occuper que de plaintes qui vont au-delà du champ d'application de cette convention collective.



The Board will also not exercise its discretion and will hear matters of public policy under the Code.

Finally, the Board proposed a test: it had to determine whether there was a genuine statutory right to be defined or reasserted. When the answer is "no", the Board exercises its discretion and refuses to hear the matter.

Since the Supreme Court decisions in Weber v. Ontario Hydro and New Brunswick v. O'Leary, a new test emphasizes the examination of the facts giving rise to the dispute rather than the legal characterization of the dispute.

Under the exclusive jurisdiction model, the essential character of the dispute must be defined since the arbitrator has exclusive jurisdiction over disputes arising under the collective agreement.

According to the Board, this is a matter which pursuant to section 98(3) could be referred by the complainant to arbitration; the Board therefore refuses to hear the complaint alleging violations of sections 94(1)(a), 94(3)(a)(i), 94(3)(b), 94(3)(d)(ii) and 94(3)(f) of the Code by the Canadian Museum of Civilization Corporation.

En outre, le Conseil n'exercera pas son pouvoir discrétionnaire et examinera des questions d'ordre public aux termes du Code.

Enfin, le Conseil a proposé le critère suivant pour décider s'il existe un véritable droit statutaire à définir ou réaffirmer. Dans la négative, le Conseil exerce son pouvoir discrétionnaire et refuse d'instruire l'affaire.

Depuis les jugements de la Cour suprême dans Weber c. Ontario Hydro et New Brunswick c. O'Leary, un nouveau critère met l'accent sur l'examen des faits donnant lieu au conflit plutôt que sur la qualification juridique du conflit.

Selon le modèle juridique exclusif, la caractéristique essentielle du conflit doit être définie puisque l'arbitre a compétence exclusive en ce qui a trait aux conflits découlant de la convention collective.

D'après le Conseil, il s'agit en l'espèce d'une question qui, aux termes du paragraphe 98(3) du Code, peut être renvoyée à l'arbitrage par le plaignant; le Conseil refuse donc d'instruire la plainte alléguant violation des alinéas 94(1)(a), 94(3)(b), 94(3)(f) et des sous-alinéas 94(3)(a)(i) et 94(3)(d)(ii) du Code par le Musée canadien des civilisations.

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## Reasons for decision

Public Service Alliance of Canada,

*complainant,*

*and*

Canadian Museum of Civilization Corporation  
and Mr. Joe Guerts,

*respondents.*

Board File: 745-5022

CLRB/CCRT Decision no. 1181

September 30, 1996

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The Board was composed of Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair and Ms. Mary Rozenberg and Mr. Patrick H. Shafer, Members. A hearing was held on September 11, 1995 at Ottawa.

### Appearances

Mr. Derek Dagger, Grievance and Adjudication Officer for the complainant,  
and;

Mr. Graham Clarke, Counsel, assisted by Michelle E. Holland, Director of Human Resources, for the respondents.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C./c.r., Vice-Chair.

This complaint filed by the Public Service Alliance of Canada for various complainants, alleges violations of sections 94(1)(a), 94(3)(a)(i), 94(3)(b), 94(3)(d)(ii) and 94(3)(f) of the Code by the Canadian Museum of Civilization Corporation. The Board decided to hear the parties only on the question of whether or not it ought to exercise its discretion under section 98(3) of the Code.

In order to address this question, the Board will first review the rationale behind section 98(3) of the Code as well as the factors developed by the Board in exercising its discretion to defer to arbitration a complaint properly before it. Against this background, the Board will then analyze Weber v. Ontario Hydro; [1995] 2 S.C.R. 929; and New Brunswick v. O'Leary, [1995] 2 S.C.R. 967.

**(1) Section 98(3): Rationale and Factors Considered by the Board in Dealing with Requests to Defer to Arbitration**

The Canada Labour Code is one of the four statutes in Canada which mentions specifically the Board's power to defer unfair labour practice complaints to arbitration. Section 98(3) of the Code reads as follows:

*"98. (3) The Board may refuse to hear and determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or an arbitration board."*

Section 57(1) of the Code requires that every collective agreement contain a provision for final and binding settlement by arbitration. And section 60(1)(b) gives arbitrators the power to decide whether a matter referred to them is arbitrable or not. These provisions state:

*"57.(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention."*

...

*60.(1) An arbitrator or arbitration board has*

...

*(b) power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable."*

The Board first dealt with the interpretation of section 98(3) of the Code in 1975. It described the circumstances where it would have to exercise its discretion pursuant to that provision as follows:

*"...In the event of a possible conflict or overlapping of the provisions of a collective agreement and the unfair labour practices provisions of the Code, the Board is given the power to refuse to hear and determine the complaint which could be referred by the complainant to an arbitrator pursuant to the provisions of a collective agreement."*

(Air Canada (1975), 11 di 5; [1975] 2 Can LRBR 193; and 75 CLLC 16,164 (CLRB no. 45), page 13; 194; and 1220; emphasis added)

The Board then explained the approach it would follow in exercising its jurisdiction to defer a complaint to arbitration:

*"The very wording of Section 188(2) of the Canada Labour Code (Part V) makes it clear that the sole fact that a matter may be referred to arbitration under a collective agreement does not automatically deprive the Board of its jurisdiction to hear and determine an unfair labour practice complaint involving the same issue. However, the Board is permitted to refuse to exercise its jurisdiction. Nevertheless, it seems clear that the Board should be careful not to interfere with the grievance arbitration procedure established under a collective agreement, in accordance with the requirements of the Canada Labour Code (Part V)."*

(pages 13; 195; and 1220)

Two years later, in Bell Canada (1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97), the Board explained the rationale behind section 98(3) of the Code in the following terms:

*"... it seems obvious that Parliament wishes, where a contractual relationship exists between an employer and a bargaining agent, by virtue of a collective agreement, that disputes which may arise between them be settled, in so far as possible, through recourse to binding arbitration, in accordance with the terms of the said collective agreement.*

*Private arbitration is undoubtedly one of the most valuable mechanisms invented in the field of labour relations for the settlement of disputes between parties. This is why the Canada Labour Code provides for the referral described in section 188(2) [now section 98(3)].*

...

*... Parliament saw fit to give the Board the discretionary power to refer even unfair labour practices cases to arbitration. It would appear that it took such action in order to avoid the same litigant having recourse to two separate remedies or to avoid having the Board act as an appeal tribunal from arbitral decisions. Between the extreme position adopted by some labour boards, as evidenced by the decisions rendered by them, to the effect that the existence of an arbitration clause in a collective agreement automatically requires the boards to refer all matters to arbitration and, consequently, to decline jurisdiction, and the other extreme revealed in the decisions by other labour boards, whereby the latter never decline jurisdiction in this area, we feel that there must be a happy medium. In the case of the Canada Labour Code, the finding of this happy medium is facilitated by the very texts which govern the arbitration provisions."*

(pages 363-364; 7; and 374)

The Board then set out five criteria governing the exercise of its discretion under section 98(3):

*"... The first factor is naturally the existence of a collective agreement. The second factor is the presence or absence in the collective agreement of concrete provisions concerning anti-union discrimination which may allow recourse to the grievance procedure and ultimately, to arbitration. A third factor is the actual text outlining the grievance procedure, the universality of its application to employees and the possibility of filing a grievance in the event of*



*an alleged violation of an anti-discrimination clause of this nature. A fourth factor is the connection which exists between the grievance procedure and the arbitration procedure itself, that is, the possibility of a given grievance being referred to arbitration. Some collective agreements limit the number and type of disputes that may be referred from the grievance procedure to arbitration. Lastly, the jurisdiction of the arbitrator and the arbitration tribunal must be examined. Some collective agreements limit this jurisdiction or the powers of the arbitrator or the arbitration tribunal in granting remedies or redress.*

*If the indications concerning each and every one of the above factors are positive, then it is more likely that the board will exercise its discretion pursuant to section 188(2) [now section 98(3)] of the Code."*

(pages 365; 8; and 375)

In conclusion, the Board stated that even if all the above factors are present, it will still assess whether alleged unfair practices can be settled at arbitration.

In 1989, the Board suggested that this practice be reassessed since, in its view, complaints were rarely deferred to arbitration. In the Board's opinion, the second factor helped convince the Board to hear the complaint where complainants could only demonstrate that their collective agreements contained no anti-union animus provisions. It therefore recommended that the Board be more flexible than it had been in the past in deciding whether or not to defer to the arbitration process:

*"The approach expressed in Bell Canada, supra, has been followed by the Board to this day, with the result being that the Board rarely defers to arbitration pursuant to section 98(3). In fact, it has become fashionable for trade unions bringing complaints to the Board under section 97 to allege anti-union animus and then to point out that their collective agreement contains no anti-union animus provisions or remedies, to convince the Board that it should not defer to arbitration. Applying the five-step criterion from Bell Canada, the Board is almost obligated to hear all such complaints. In the respectful opinion of this panel of the Board, this should not be so. We think perhaps the time has come for the Board to take*

*another look at its practice vis-à-vis section 98(3) and lean towards giving more priority to the private dispute resolution mechanisms that are mandatory in each collective agreement under the Code. Particularly where there has been a long-standing relationship between the parties, where the dispute arises from their day-to-day operations and where there are no important matters of public policy under the Code at stake."*

(Canada Post Corporation (1989), 76 di 212 (CLRB no. 729), page 215; emphasis added, see also Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRB no. 805).

Consequently, the Board took the view that if a collective bargaining regime is in place, it should only deal with complaints where circumstances are such that they go beyond the scope of the collective agreement or where matters of public policy under the Code are at stake. See Canadian National Railway Company (1995), 97 di 1 (CLRB no. 1109); Canada Post Corporation (1995), 96 di 175 (CLRB no. 1108); Wackenhut of Canada Limited (1994), 94 di 173 (CLRB no. 1074); Sandra Castro-Martin et al. (1992), 88 di 104 (CLRB no. 943); Canada Post Corporation (1992), 87 di 26 (CLRB no. 915); Radio Futura Limitée (CKVL/CKOI) et al. (1992), 87 di 7; and 16 CLRBR (2d) 152 (CLRB no. 913); and Canadian Broadcasting Corporation (1990), 83 di 102; and 91 CLLC 16,007 (CLRB no. 839).

The Board found that this approach is in keeping with the one adopted "by the courts who have been showing more and more deference to the arbitration process over the past decade" see St. Anne Nackawic Pulp and Paper v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704.

Finally, in Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRB no. 800), the Board proposed that, before deciding to defer a complaint to arbitration, the following question be answered in the negative:

*"Is there in this case a genuine statutory right that the board must define or reassert? After having reviewed the evidence and the*

*parties' submissions and on the basis of the evidence, we find that there is none."*

(pages 38; and 127)

(2) Analysis of Weber and O'Leary

In Weber v. Ontario Hydro, supra, and its companion case New Brunswick v. O'Leary, supra, the Supreme Court of Canada had to determine the extent to which final and binding arbitration clauses oust the courts' jurisdiction. The applicable provision in those two cases, section 45(1) of the Ontario Labour Relations Act, R.S.O. 1990, c. L.2. is almost identical to section 57 of the Canada Labour Code combined with section 60(1)(b).

The facts in Weber may be briefly summarized as follows. Mr. Weber, employed by Ontario Hydro, had taken an extended leave of absence as a result of back problems. His employer paid him sick benefits in accordance with the collective agreement until it found out through a private investigation that Mr. Weber was abusing the said benefits. Mr. Weber filed grievances alleging that in hiring private investigators, his employer had violated the terms of the collective agreement. Among other things, Mr. Weber requested that Ontario Hydro pay him damages for mental anguish and suffering resulting from the surveillance.

In the interim, Mr. Weber filed a court action based on tort and breach of his rights under sections 7 and 8 of the Canadian Charter of Rights and Freedoms, claiming damages for the surveillance. The motions judge dismissed the court action on the grounds that it had no jurisdiction because the dispute arose from the collective agreement and ruled that the Charter claims constituted a private matter to which the Charter did not apply.

Unanimously, the Supreme Court of Canada agreed, for the reasons given below, that the tort action could not stand given the existence of the collective agreement and section 45(1) of the Ontario Labour Relations Act. A majority of the Court went further and determined that the Charter action was also precluded from being heard by the courts. The minority dissented only on this second aspect of the case, basing their disagreement on the treatment of arbitrators as "courts of competent jurisdiction".

The Court delineated and analyzed the three different existing models dealing with the effect of binding and final arbitration clauses: (1) the concurrent model; (2) the model of overlapping jurisdiction; and (3) the exclusive jurisdiction model.

The Court rejected both the models of concurrent and overlapping jurisdiction between courts and arbitrators for three main reasons: the existing jurisprudence; the wording of section 45 of the Labour Relations Act; and the practical effect of such model.

First, in St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, supra, the Supreme Court clearly stated that mandatory arbitration clauses contained in labour statutes deprive courts of concurrent jurisdiction. With the exception of residual inherent jurisdiction of courts over injunction, the Court ruled that concurrent actions were not available:

*"What is left is an attitude of judicial deference to the arbitration process. It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of*



*a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. "*

(page 721; emphasis added)

Secondly, dealing with the wording of section 45 of the Labour Relations Act, the Court held that the word "differences" refers to the dispute between the parties to the collective agreement and not the legal actions that they might bring against one another. In the Court's view:

*"... The object of the provision - and what is thus excluded from the courts - is all proceedings arising from the difference between the parties, however those proceedings may be framed...."*

(Weber, supra, page 954)

Thirdly, the practical effect of both models would be to undermine the purpose of the exclusive arbitration regime created by the legislator which, according to the Court, *"lies at the heart of all Canadian Labour statutes"* (Weber, supra, page 954). Indeed, concurrent or overlapping jurisdiction models would defeat one of the main goals of such a regime, i.e. the efficient and economic resolution of disputes between parties to a collective agreement.

More specifically in the case of the model of overlapping jurisdiction, it has been held that such a choice would encourage parties to raise and debate over the legal characterization of a dispute where the cause of action clearly lies within the ambit of the collective agreement.

For this reason, the Supreme Court adopted a test which emphasizes the examination of the facts giving rise to the dispute rather than the legal characterization of the dispute. The Court phrases the test to determine whether an arbitrator has jurisdiction in the following manner:

*"... The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one 'arising under [the] collective agreement'. Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it."*

(page 953)

Consequently, the Court adopted the exclusive jurisdiction model where all differences arising under the collective agreement are settled at arbitration. Under this model, the courts have no power to entertain an action in respect of such a dispute and there is no overlapping jurisdiction. Two elements are to be considered: the dispute and the ambit of the collective agreement.

The decision-maker is therefore required to define the "essential character" of the dispute. Some factors may guide this examination, such as the identity of the parties, the place of conduct and the time the claim originated. Generally, in each case, the question to be determined is whether the essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement. And again most importantly, this analysis is done without considering the legal characterization of the issues raised.

Overall, the Court found that the exclusive jurisdiction model responded to the three main considerations, i.e. the statute, the jurisprudence and the policy:

*"To summarize, the exclusive jurisdiction model gives full credit to the language of s. 45(1) of the Labour Relations Act. It accords with this Court's approach in St. Anne Nackawic. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts: see Ontario*

*(Attorney-General) v. Bowie* (1993), 110 D.L.R. (4th) 444 (Ont. Div. Ct.), per O'Brien J. "

(Weber, supra, page 959)

A majority of the Court extended this exclusive jurisdiction model to Charter claims, provided the arbitrator has jurisdiction over the parties and the dispute and has the power to grant the remedy sought under the Charter. Relying on Mills v. The Queen, [1986] 1 S.C.R. 863, the Court therefore ruled that arbitrators are a "court of competent jurisdiction" under section 24(1) of the Charter if these conditions are met.

Looking at the facts of the Weber case, the Court rejected Mr. Weber's argument that the dispute fell outside the collective agreement. Mr. Weber alleged that hiring private investigators who used subterfuge to enter his home is not a matter of interpretation of the collective agreement but rather a matter of common law and constitutional rights.

The Court examined the collective agreement, which contained a grievance procedure extending to any allegation dealing with unfair treatment or any dispute arising under the agreement. The collective agreement also provided that the application of the Ontario Hydro Sick Leave Plan was vested solely in Ontario Hydro. Because Ontario Hydro allegedly acted improperly in exercising its right to decide what benefits an employee would receive, the Court concluded that the essential character of the dispute arose under the collective agreement. In the Court's view:

*"... While aspects of the alleged conduct may arguably have extended beyond what the parties contemplated, this does not alter the essential character of the conduct..."*

(Weber, supra, page 965)

Finally, a majority of the Court found that the arbitrator in this case also had exclusive jurisdiction over the Charter claims based on Mills v. The Queen, supra.

The Supreme Court of Canada applied these principles to the companion case of New Brunswick v. O'Leary. The circumstances of that case were as follows. Mr. O'Leary, an employee of the New Brunswick government, had to travel throughout the province as part of his work. His employer alleged that he drove its leased vehicle with a flat tire, requiring repairs amounting to approximately \$3,000. The employer brought an action against Mr. O'Leary for that amount, alleging that he was responsible for the damage. Mr. O'Leary took the position that the courts lacked jurisdiction because the matter arose under the collective agreement.

The Court found that the essential character of the dispute concerned the "preservation of the employer's property and equipment" (O'Leary, supra, page 970). In the Court's view, categorizing the dispute in terms of negligence does not remove it from the scope of the collective agreement which provides for the employees' obligations to ensure the safety and dependability of the employer's property and equipment. Accordingly, the Court also ruled in that case that the dispute arose under the collective agreement and that the arbitrator had exclusive jurisdiction to resolve it.

**(3) Impact of Weber and O'Leary on the Board's Discretion Pursuant to Section 98(3) of the Code**

The question to be examined in this context is whether the Board's present approach and the test it developed in exercising its jurisdiction pursuant to section 98(3) of the Code should be reassessed in view of the Supreme Court of Canada's ruling and reasoning in these two important cases.

In Weber and O'Leary, supra, the Supreme Court of Canada addressed the issue of overlapping and concurrent jurisdiction between courts and arbitrators acting under collective agreements. The Court did not deal with the possibility of overlapping



jurisdiction between labour relations boards and arbitrators, two institutions specialized in labour relations. This question was not at issue before it.

However, if the Supreme Court ruled that arbitrators have exclusive jurisdiction over labour disputes arising under collective agreements, courts ought not to seize themselves of such matters. The Board *a fortiori* should not deal with complaints where the dispute, regardless of its legal characterization, is one arising under the collective agreement.

The reasoning contained in Weber, supra, with respect to the "courts-arbitrators" relationship applies *mutatis mutandis* to the "courts-Board" relationship regarding matters arising from the Code. Indeed, the three existing underlying grounds to adopt the exclusive jurisdiction model in favour of the arbitral jurisdiction are even more so present with regard to the Board's jurisdiction given its strong privative clause and its broad remedial powers. See Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 R.C.S. 369; (1996) 193 N.R. 81; and 96 CLLC 210-011. Long-standing jurisprudence has demonstrated undoubtedly that curial deference is the rule when dealing with decisions issued by specialized labour boards created by the legislator to resolve, in an efficient and economic manner, labour relations disputes between workers, unions and employers. (Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157.)

Also, given the exclusive jurisdiction now conferred on the arbitrator to deal with Charter claims (which are constitutional rights), it will be arguable whether the courts still have a concurrent jurisdiction to determine the constitutional characterization of an undertaking in cases where the Board is, in proceedings under the Code, already required to determine that issue, even if the constitutional area is not strictly speaking its field of expertise. In any event, the courts may be asked to review the constitutional findings of facts made by the administrative tribunal on the basis of the "correctness" test of judicial review.

However, the same might not be equally true with regard to the "Board-arbitrators" relationship where jurisdiction might be viewed as concurrent or overlapping between the two statutory tribunals. Although arbitrators are often referred to as tribunal of the parties, arbitrators appointed under a collective agreement concluded pursuant to the Canada Labour Code are nevertheless considered statutory tribunals given the powers vested in them by statute: Roberval Express v. Transport Drivers Union, [1982] 2 S.C.R. 888. Substantial distinctions may be found between the two relationships (courts-arbitrators and Board-arbitrators).

As mentioned above, the Board and the arbitrator acting under the Canada Labour Code are two specialized tribunals, each experts in their own specific labour field. Although the Board's jurisdiction is more extensive (i.e. remedial authority), both only possess the powers conferred upon them by virtue of the legislation and/or the collective agreement entered into by the parties. Also, although protected by different privative clauses (section 22 is stronger than section 58 of the Code), both their decisions are subject to judicial review.

Unlike the British Columbia model, the Canada Labour Relations Board does not review arbitral awards, which are final pursuant to section 58 of the Code. Arbitral awards may be challenged before provincial superior courts (section 58(3) of the Code) whereas Board decisions may be contested only before the Federal Court of Appeal.

However, arbitrators appointed pursuant to collective agreements entered into under the federal regime may refer to the Board questions relating to the existence of a collective agreement or the identity of the parties or employees bound by a collective agreement (section 65 of the Code). These questions fall within the Board's core expertise to determine whether a collective agreement is in operation, who is an employee, an employer or a trade union and whether they are party to or bound by a collective agreement (see section 16(p) in relation to proceedings before the Board). This is a demonstration of consistency within the scheme of the Code since the Board,

in dealing with issues relating to the identity of the parties, is simply interpreting the scope of the bargaining units it has defined (section 27). As Justice Taggart of the B.C. Court of Appeal puts it in Canadian Pacific Air Lines Limited, no. CA001759, June 19, 1984:

*"Nevertheless the grant to the C.L.R.B. of the power to decide what is an appropriate unit of employees for the purpose of collective bargaining is indicative of the kind of authority Parliament intended the C.L.R.B. to have. In my opinion when s. 158(1) [now section 65(1)] is read together with that power and the privative sections to which I have referred, there is a clear indication that Parliament intended issues such as those before us to be resolved by the processes created by the Canada Labour Code."*

(page 17)

Given these attributes, is the test used by the Board in dealing with section 98(3) of the Code in keeping with the reasoning adopted by the Supreme Court of Canada in Weber, supra,

Insofar as the test concentrates only on whether genuine statutory rights are to be defined or reasserted, the answer would be negative. On the other hand, where the emphasis is on determining whether the dispute goes beyond the scope of the collective agreement, the test developed by the Board complies with the Supreme Court's instructions in Weber, which clearly held that arbitrators are to have exclusive jurisdiction over disputes arising under the collective agreement. In Weber, the Court, per McLachlin J., clearly stated that the courts are not to define or characterize the action legally:

*"... the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed...."*

(page 953)

Consequently, when examining whether statutory rights have to be reaffirmed under the Code, the Board is then scrutinizing the possible legal aspects of the dispute and the rights flowing from the statute, rather than asking itself whether the dispute could be resolved at arbitration, and whether the arbitrator has the power to grant the remedies requested.

Conversely, if considering only whether the matter goes beyond the scope of the collective agreement, the Board will then concentrate on the facts of the dispute, regardless of its legal characterization, as directed by the Supreme Court in the context of court actions. The Board will then determine the "essential character" of the dispute and will be guided, *inter alia*, by the identity of the parties, the place of conduct, the time of the claim and whether the remedies sought may be granted by an arbitrator. In a general sense, the essential character of the dispute will be found to arise under the collective agreement if it concerns its application, interpretation, administration or alleged violation.

Following this test, the Board adopts a more deferential approach in order to avoid possible conflicting decisions by different supervisory courts, especially since the arbitrator is given the power to determine whether a matter is arbitrable (section 60(1)(b)).

The Board has the power to determine whether a collective agreement is in operation and whether an employee, an employer or a trade union is bound by a collective agreement in relation to any proceedings before it (section 16(p)) or in the context of a referral pursuant to section 65 of the Code. Once the parties to an existing collective agreement have been identified, the actual rights flowing from that collective agreement rest solely within the arbitrator's jurisdiction to determine. A relevant example of this delimitation may be observed where the Board, in dealing with unfair labour practices complaints alleging violation of section 37, orders a trade union to refer a grievance to arbitration without strictly ascertaining whether the grievance is arbitrable. Although it is clear in some cases that a matter may not be



the subject of a duty of fair representation complaint since it is explicitly not one of the "rights under the collective agreement" (i.e. a union's conduct before the Workers' Compensation Board, Charles Morana, July 26, 1994 (LD 1328), or where no collective agreement is in force, Eugene Kalwa (1995), 96 di 157 (CLRB no. 1106)), other circumstances which prove to be more ambiguous (such as claims concerning medical or dental plans - which often concerns the interpretation of the collective agreement and the contract entered into between the employer and the insurance company) are better dealt with by the arbitrator, the forum chosen by the legislator to determine the arbitrability of a grievance (s. 60(1)(b) of the Code).

In Canadian Union of Public Employees, Airline Division v. Ashton and Time Air Inc., (1994), 170 N.R. 347 (F.C.A.), the Federal Court of Appeal recognized that, in those circumstances, the Board may refer such a matter to arbitration pursuant to section 99 of the Code since it is for the arbitrator to determine its arbitrability:

*"We heard the counsel for the Board as an intervener on this question of jurisdiction, and it is apparent that the Board's interpretation of s. 37, taken in conjunction with s. 60(1), is that under s. 37 the Board is to address only the question of fair representation, and that all issues as to whether a matter is arbitrable, and in particular the application of the collective agreement to the grievance, are to be left to the arbitrator to decide. Given the factual complexity of the matters that may be put in issue (in the instant case, e.g., whether the examination marking was accurate, whether the suspension was disciplinary, whether it was justified) one can see some wisdom on the Board's part in believing that the relationship of the facts to the collective agreement is best determined by an arbitrator, and that this was Parliament's intention. Certainly, this Court in not is a position to say that such an interpretation is irrational."*

(pages 349-350)

Similarly, were the Board to adopt a more deferential approach in the context of deferrals to arbitration pursuant to section 98(3), it may, when the arbitrability of a matter is in doubt, stay its proceedings until the arbitrator decides whether the dispute is arbitrable. See Canadian National Railway Company (1995), 96 di 137; and 27 CLRBR (2d) 45 (CLRB no. 1103); and Canadian Broadcasting Corporation (1994), 96 di 122; 27 CLRBR (2d) 110; and 95 CLLC 220-028 (CLRB no. 1102). Such a procedural option is comparable to an arbitrator's discretion, pursuant to section 65(2) of the Code, to suspend the proceeding until the Board, after being seized of a referral pursuant to section 65(1), determines whether a collective agreement is in force and/or identifies the parties to the collective agreement.

Section 65(2) reads:

*"65.(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding."*

Of course, as is the case with section 65(2) which requires the existence of a referral pursuant to section 65(1), this option presupposes that a grievance has been or may be filed in accordance with the grievance procedure found in the collective agreement. Otherwise, the Board would be left to determine whether the absence of a grievance is an element to be considered in favour of entertaining the complaint. See Ontario Hydro (1995), 98 di 157 (CLRB no. 1130) (confirmed by Eugene Kalwa v. Ontario Hydro et al., judgment rendered from the bench, no. A-490-95, February 29, 1996 (F.C.A.)).

#### **(4) Conclusion**

When dealing with a matter pursuant to section 98(3) on the Code, the Board need not entertain the merits of various complaints alleging violation of section 94(1)a), 94(3)a)(i), 94(3)(b), 94(3d)(ii) and 94(3)e) of the Code.

The facts on file are deemed to be uncontested by the parties. The discretion of the Board is to retain jurisdiction and hear the complaints, or to refuse to hear the matter so it could be referred, at the sole discretion of the complainant, to arbitration. (see Canada Post Corporation (1995), 96 di 175 (CLRB no. 1108).

In the particular circumstances of this case and having heard the submissions of the parties, the Board decides that this is a matter which, pursuant to section 98(3), could be referred by the complainant to arbitration and therefore refuses to hear the complaints made pursuant to section 97 of the Code.

The unfair labour practices complaints allege that the employer violated the collective agreement by proceeding with the lay offs of the four complainants.

The grievance of one complainant, Francine Boucher, has already been debated between the parties at arbitration.

The whole issue is whether or not the employer is prevented by the collective agreement from laying off staff.

The Board finds the arbitrator has power under section 60(1)b) of the Code to decide the arbitrability of the grievances where settlement documents have been executed by the grievors.

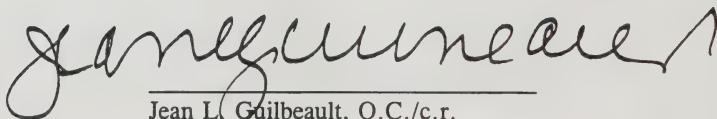
The Board determines that the essential character of this dispute arose under the collective agreement and therefore the actual rights flowing from that collective agreement rest solely within the arbitrator's jurisdiction to decide.

It is also the opinion of the Board that the whole matter will be better dealt with by the arbitrator.

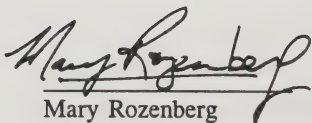
Finally, the Board finds it is not necessary to determine whether this dispute goes beyond the scope of the collective agreement rather than on whether genuine statutory rights are to be defined or reasserted.

This file is closed.

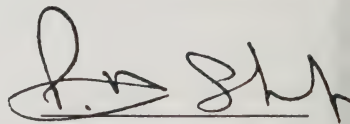
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C./c.r.  
Vice-chair



Mary Rozenberg  
Member



Patrick H. Shafer  
Member



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## Summary

Association of Independent Miners, *applicant*,  
Anvil Range Mining Corp., *respondent*, and  
United Steelworkers of America, *intervenor*.

Board File: 555-4048  
CLRB/CCRT Decision no. 1182  
September 6, 1996

## Résumé

Association of Independent Miners, *requérant*,  
Anvil Range Mining Corp., *intimé*, et  
Métallurgistes unis d'Amérique, *intervenant*.

Dossier du Conseil: 555-4048  
CLRB/CCRT Décision n°1182  
le 6 septembre 1996

In an application for certification by a newly-formed association of employees, the Board found that the application was really a raid on the incumbent trade union. In light of the termination provisions of the collective agreement (which the Board had found to be continued by virtue of the "successor employer" provisions of the Canada Labour Code), the Board found that the application was untimely under Section 24 of the Code, which sets out the times when such applications can be made.

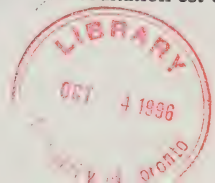
The Board further found, having regard to all of the evidence presented in the course of a three-day hearing, that the association was so "dominated or influenced" by the employer that its fitness to represent employees in collective bargaining was impaired. Accordingly, the Board was prevented from certifying the Association by virtue of Section 25 of the Code.

The application for certification was therefore dismissed.

Dans cette affaire, le Conseil juge que la demande d'accréditation présentée par une nouvelle association d'employés constitue en fait un acte de maraudage à l'égard du syndicat en place. Compte tenu des dispositions de la convention collective régissant l'expiration de celle-ci, et du fait qu'il a déjà établi que cette convention collective demeure en vigueur aux termes des dispositions du Code portant sur l'employeur successeur, le Conseil estime que la demande d'accréditation n'a pas été présentée dans les délais prescrits à l'article 24 du Code.

Le Conseil conclut en outre, à la lumière des éléments de preuve présentés au cours d'une audience de trois jours, que l'association est "dominée ou influencée" par l'employeur au point que son aptitude à représenter les employés est compromise. L'article 25 du Code interdit au Conseil d'accréditer l'association.

La demande d'accréditation est donc rejetée.



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## Reasons for decision

Association of Independent Miners,  
*applicant,*

Anvil Range Mining Corp.  
*respondent,*

*and*

United Steelworkers of America,  
*intervenor.*

Board File: 555-4048  
CLRB/CCRT Decision no. 1182  
September 6, 1996

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Mr. Michael Eayrs and Ms. Véronique L. Marleau, Members. A hearing was held at Whitehorse, Yukon, on August 20, 21 and 22, 1996.

### Appearances

J. Merkowsky, President and M. Corbett and H. Dorris, for the applicant;  
S. Day (August 20 only), for the respondent employer; and  
M. Rowlinson, assisted by B. Fortin, for the United Steelworkers of America.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

### I

In this application, received by the Board on April 26, 1996, the Association of Independent Miners seeks certification as bargaining agent for a unit of employees of the respondent Anvil Range Mining Corp. employed at its mining and production operations at Faro, Yukon.

The constitution and other documents relating to the founding and purposes of the Association were filed with the Board, and it would appear from them that the Association is a trade union within the meaning of section 3(1) of the Canada Labour Code.

At the time this application was filed the United Steelworkers of America was the certified bargaining agent for a unit of employees of the employer, described as follows:

*"all employees of Anvil Range Mining Corp. employed in its mining and production operation at Faro, Yukon, in the mine operations, mine maintenance, mill operations and mill maintenance departments and in the warehouse, excluding office and clerical, technical, and supervisory employees and those above."*

The unit applied for by the applicant is described as follows:

*"all employees of Anvil Range Mining Corp. employed in its mining and production operations at Faro, Yukon, except professional employees."*

In fact, the unit applied for includes all employees in the existing bargaining unit with the addition, essentially, of certain employees employed in clerical and security tasks, and whom the Board would not consider appropriate for inclusion in the "mining and production" unit. The unit applied for is not, in terms of the number of employees covered, very substantially larger than that currently represented by the United Steelworkers of America, and in our view, this application is properly characterized as a "raid" on the existing unit. Indeed, the uncontradicted evidence is that the founding group of the Association were advised to seek certification for a unit somewhat larger than that represented by the United Steelworkers, so as to avoid a problem with respect to the timeliness of the application - a matter to which we will now turn. That tactic, which we consider to be no more than that, does not succeed



since, as we have found, this application is in fact for a bargaining unit substantially the same as that represented by the incumbent trade union.

## II

The United Steelworkers of America, the certified bargaining agent and the intervenor in these proceedings, has raised the objection that this application is not timely, having regard to the provisions of section 24 of the Canada Labour Code. The material provisions of that section are the following:

*"24. (2) Subject to subsection (3) [which is not material to the present application], an application by a trade union for certification as the bargaining agent for a unit may be made*

*(a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;*

*(b) where no collective agreement applicable to the unit is in force but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;*

*(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and*

*(d) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only*

*(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and*

*(ii) after the commencement of the last three months of its operation.*

*(c) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and*

*(d) where a collective agreement applicable to the unit as in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only*

*(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and*

*(ii) after the commencement of the last three months of its operation. "*

It is the contention of the United Steelworkers of America that subsection 24 (2) (d) applies in this case, and that the application has not been brought within the time which, under the provisions of that subsection, would be appropriate. The determination of the question of timeliness is somewhat complex, given the circumstances of this case.

### III

On June 12, 1991, a collective agreement was entered into between Curragh Resources Inc., the predecessor employer, and the United Steelworkers of America, bargaining agent for employees of Curragh in its mining and production operations. That collective agreement was, by its terms, to be effective up to and including October 31, 1993, "and thereafter until a new collective agreement is signed or until any statutory continuation of the terms has come to an end." Had the operations of Curragh Resources Inc continued, it would have been expected that a new collective agreement would be negotiated, and the collective agreement in question would have

been described as one "for a term of not more than three years". Curragh, however, ceased operations in April, 1993. It went into receivership, and the receiver did not operate the mine.

On June 1, 1995, Anvil Range Mining Corp., which had been established for the purpose of purchasing and operating the former Curragh property at Faro, began mining and production operations at the property (preparatory work had been performed by a subcontractor). The circumstances relating to the closing and reopening of the mine are described in CLRB decision no. 1160, in which this Board determined that Anvil Range Mining Corp. was a successor employer to Curragh - that there had been a sale of a business within the meaning of section 44 of the Canada Labour Code - and that the United Steelworkers of America was the bargaining agent for employees in the bargaining unit in question.

Section 44 of the Code provides, in the provisions material to this application, that:

*"44. (2) Subject to subsections 45(1) to (3), where an employer sells his business,*

*(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;*

*(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;*

*(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; where an employer sells his business, and*

*(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."*

(emphasis added)

In view of the fact that there was a two-year hiatus - the mine remaining inoperative for two years -, that when Curragh ceased operations a 6-month period remained on the collective agreement, and that when Anvil started operating, its status as successor employer was not confirmed until February 22, 1996 when the Board issued its order, it is not clear whether or not the collective agreement must be considered to be of the sort described in section 24(2)(c) or in section 24(2)(d) of the Code. What is clear, however, is that this application was not brought either "after the commencement of the last three months of its operation" or "during the three-month period immediately preceding the end of each year that the collective agreement continues to operate". There was, in our view, a "statutory continuation" of the collective agreement, and that continuation had not come to an end, nor will it do so, in the circumstances of this case, until October 31, 1996. The agreement would appear to be subject to continuation after that period if no new collective agreement is signed, but it is clear that there will be an "open period" during the months of August, September and October, 1996. The present application was not brought within that period, and must accordingly be dismissed. That this should be so is entirely consistent with the purposes of the Code in establishing and continuing bargaining rights, and in limiting the periods of time in which applications may be brought to bring them to an end.

#### IV

While the foregoing would be sufficient to dispose of the present application, assuming that the Board would not deem it fit to exercise its discretion, pursuant to section 24(2)(b) of the Code, to reduce the time limits applicable to the open period, we consider that it is important, having regard to all the circumstances of this case, that we deal as well with the allegation made by the United Steelworkers of America that the applicant may not be certified as bargaining agent for the employees in the bargaining unit in question, by virtue of the provisions of section 25(1) of the Canada Labour Code. That section is as follows:



*"25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part.*

While there is no evidence before us to permit the conclusion that the employer "dominated" the applicant Association on any proper interpretation of that term, there is substantial evidence, both circumstantial and direct, of employer influence to an extent which would impair the fitness of the applicant to represent the employees in the bargaining unit. The tests to be applied where an allegation under section 25(2) is made were most recently set out by the full Board in the Royal Oak Mines (1993), 92 di 153 (CLRB no. 1028). At page 7 of that decision, the Board stated:

*"The threshold test to be applied in this jurisdiction, much like in all provincial jurisdictions, in order to determine if a trade union is dominated or unduly influenced by the employer, is whether there exists the proper arm's length relationship between the trade union and the employer."*

The full Board went on to say:

*" - - - any degree of domination suffices to trigger section 25, since it impairs a union's fitness to represent employees. Domination implies the lack of an arm's length relationship. - . "*

(page 10; emphasis added)

With respect to the existence of an arm's length relationship the full Board further said:

*" - - - it is also imperative that employees perceive that a trade union seeking their support is an institution totally independent of*

*management, capable of asserting their claims and enforcing their interests. - - - "*

(page 9)

That the applicant Association reflects, and is reasonably perceived by employees to reflect management influence, appears from the course of events following the reopening of operations at the mine in June, 1995. Very soon after that, the United Steelworkers of America asserted its claim that there had been a sale of business within the meaning of the Code, and sought both to have the terms of what it asserted (correctly, as the Board determined) to be the applicable collective agreement applied, and to begin negotiations with a view to obtaining a new agreement. The company ignored these overtures, and behaved as though there were no bargaining agent and no collective agreement. Indeed, the company went further, and established an "Employees Advisory Committee (E.A.C.)", with representatives at first appointed and subsequently elected from various departments, for the avowed purpose of consultation on a wide range of matters relating to working conditions.

The evidence is that one of the prime tasks of the E.A.C. was that of compiling a manual of terms and conditions of employment. To some extent at least, the provisions of this manual were actually drawn from the collective agreement. The then director of human resources of Anvil Range Mining Corp. made no secret of his views that unions were outdated and unnecessary, and that harmonious relations with employees could be better achieved through this sort of consultative, non-confrontational committee. Complaints could be discussed - there seems to have been no true grievance procedure, and certainly no thought of arbitration - in an atmosphere of goodwill, and thus resolved. Some employees were enthusiastic about the Committee, and worked diligently on it. Employees were paid for time at such meetings.

When the employer did not recognize either the union or the collective agreement, and when it refused to negotiate with it, the trade union filed an application for a

"successor employer" declaration under section 44 of the Code as well as a complaint of violation 50 of the Code (which requires the parties in such circumstances to meet and bargain collectively in good faith), and the Minister of Labour gave consent to the complaint being filed with the Board, as contemplated by section 97(3) of the Code. When the filing of that complaint became known, certain members of the E.A.C. made arrangements for the taking of a "straw vote" of employees with respect to their desire to be represented by the Steelworkers. There is evidence that some employees were told - by employees actively organizing the vote - that they would be given time off to vote, that a hall would be provided by the company, and that the vote was authorized by this Board. There is no evidence that the company actually did give time off, or that it provided a hall, and there was certainly no Board involvement in the vote. A notice, however, clearly intimating that the Board had authorized the vote, was posted on company-controlled notice boards. It reads as follows:

"

*ANVIL RANGE EMPLOYEES*

*In response to the posted Canada Labour Relations Board bulletin to employees, the representation vote on this matter will be held on August 15, 1995 from 8:00 am to 10:00 pm at the Sportman's Lounge.*

*Your vote is crucial !!*

*C.L.R.B. contact: Harvey Farysey / Gord MacIsaac*

*(604) 666-6001*

*(604) 666-6071 fax*

"

Less than half the employees participated in the vote and a majority of those voting voted against the Steelworkers. While it appears to have become clear that it could have no real effect, it became important later on for what was described by Duke Lawson, one of the two organizers of the vote, as "its moral value" and related impact on the work force. At the voting station, a form of individual "petition" was made available, which was a way of ensuring that the names of those voting for or against the Steelworkers would be known.

Some of the employee members of the E.A.C. eventually concluded that it was a creature of management, and ceased to participate in its activities, and certain others remained active, and sought to "give it teeth", while retaining its non-confrontational aspect.

In February, 1996, the Board, following a hearing in December, 1995, issued its order declaring that there had been a sale of business, and that the United Steelworkers of America was the bargaining agent for employees in the bargaining unit. Shortly after that the E.A.C. was disbanded, and shortly after that, on March 9, 1996, the applicant Association was formed. One of the two employees most active in the organization of the Association, Duke Lawson, had been most active in the E.A.C.

Organization took place promptly. The Association obtained a confidential list of employees, and it made use of the employer's photocopier, although there is no direct evidence that these things were specifically provided for them by the employer. While much of the evidence is of this circumstantial nature, there is direct evidence of a number of anti-union statements made by the former director of human resources, and it is clear on all of the evidence that the employer's intransigence with regard to the Steelworkers - even after the Board's finding of successorship, and continuing up until the Board's hearing on the section 50 complaint in June of 1996 (at which time a memorandum was signed, recognizing the continuation of the collective agreement, modifying certain of its terms, and providing compensation for its violation) was well-known to the employees. Indeed, closeness to the company and a non-confrontational working relationship with it were advanced by the supporters of the Association as a selling point.

It is difficult in this context to find the arm's length relationship and the perception of such a relationship which are essential to the proper and effective representation of employees by a bargaining agent.




What was said in Graham Cable 67 di 57, at p.72 (CLRB no. 588) is applicable to the facts in the instant case:

*"The climate so created by the employer was the perfect breeding ground for the Association. It may not have actively supported the formation of the Association in terms of providing it with financial support, for example, but there can be no doubt that it ensured by its actions that, in the eyes of the employees, the CWC was seen as a powerless entity".*

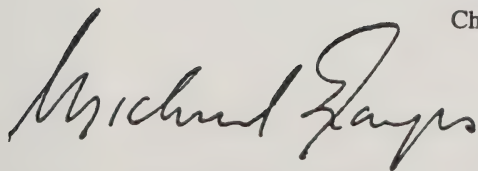
Such, in this case, was the attempt by management at the times material to this case. Its effect has been, we find, to influence the supporters of the applicant in favour of an organization which would be non-confrontational, would abjure the strike and arbitration and which would strive to be what its leaders consider the E.A.C. might have been. Such an organization is, we find, so dominated or influenced by the employer that its fitness to represent the employees is impaired. Accordingly, by virtue of section 25 of the Canada Labour Code, this Board may not certify the applicant as the bargaining agent for any unit comprised of employees of the employer.

V

Accordingly, having regard to the circumstances of this case and to the provisions of sections 24 and 25 of the Canada Labour Code, this application must be dismissed.



J.F.W. Weatherill  
Chairman



M. Eayrs  
Member



V.L. Marleau  
Member



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## Summary

Nizam Zafar, *complainant*, and Canadian National Railway Company, *respondent*.

Board File: 950-305  
CLRB/CCRT Decision no. 1183  
September 17, 1996

## Résumé

Nizam Zafar, *plaignant*, et Compagnie des chemins de fer nationaux du Canada, *intimé*.

Dossier du Conseil: 950-305  
CLRB/CCRT Décision n° 1183  
le 17 septembre 1996

These reasons deal with the referral of a safety officer's decision to the Board under section 129(5) of the Code.

Les présents motifs traitent d'un renvoi au Conseil d'une décision d'un agent de sécurité fondé sur le paragraphe 129(5) du Code.

The applicant, a coach cleaner with the Canadian National Railway Company, invoked his right to refuse work on January 26, 1995.

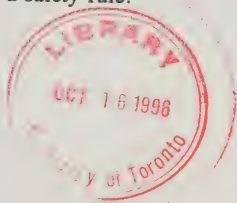
Le requérant, un préposé au nettoyage des wagons de la Compagnie des chemins de fer nationaux du Canada, a invoqué son droit de refuser de travailler le 26 janvier 1995.

The subject matter of the work refusal was the work procedure used and the time chosen for garbage pick-up from the tarmac. The applicant felt that the way the employer required him to do the work constituted a danger to him. The applicant had a preferred way to do this work.

Le refus avait trait à la méthode de travail utilisée et au moment choisi pour ramasser les déchets dans l'aire de trafic. Le requérant estimait que la façon imposée par l'employeur pour effectuer ce travail constituait un danger pour lui. Le requérant préférait le faire d'une autre façon.

Following investigation into the work refusal, the safety officer could not find any conditions which would constitute a danger to the applicant. Furthermore, the safety officer concluded that the way the employer required the work to be done was safe whereas the way the applicant preferred to do the procedure was not safe and violated a safety rule.

À la suite de l'enquête menée sur le refus de travail, l'agent de sécurité n'a décelé aucune situation qui aurait pu constituer un danger pour le requérant. De plus, l'agent de sécurité en est venu à la conclusion que la façon imposée par l'employeur était sécuritaire alors que celle que préconisait le requérant ne l'était pas et qu'elle enfreignait une règle de sécurité.



The Board considered the particular circumstances of this referral and nothing was adduced that would lead it to conclude that important or relevant matters were overlooked or improperly considered by the safety officer. The Board therefore confirms the safety officer's decision.

Après s'être penché sur les circonstances particulières de ce renvoi, le Conseil n'a é saisi d'aucune autre preuve qui l'aurait amené à conclure que l'agent de sécurité avait négligé des questions importantes ou pertinentes ou qu'il n'en avait pas tenu compte. Le Conseil confirme donc la décision de l'agent de sécurité.

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## Reasons for decision

Nizam Zafar,

*complainant,*

*and*

Canadian National Railway Company,

*respondent.*

Board File: 950-305

CLRB/CCRT Decision no. 1183

September 17, 1996

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The Board was composed of Ms. Mary Rozenberg, Board Member, pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Health and Safety). A hearing was held on May 9, 1995 in Toronto.

### Appearances

Mr. Nizam Zafar, on his own behalf, assisted by Mr. Vance Atkinson, Health and Safety Representative;

Ms. Mariana Grinblat, Safety Officer, Human Resources Development Canada - Labour;

Mr. Kenneth R. Peel, Solicitor for Canadian National.

These reasons deal with the referral to the Board of a safety officer's decision pursuant to section 129(5) of the Code. This referral arose from a refusal to work exercised on January 26, 1995 at approximately 06:25 hours by Mr. Nizam Zafar, a coach cleaner for Canadian National (CN) and a health and safety representative at the time. Mr. Zafar, initially employed as a machinist with CN in March 1984, became a coach cleaner in 1991. His work shift is from 23:00 hours to 7:00 hours.

## I

The subject matter of Mr. Zafar's work refusal was the work procedure used and the time chosen for garbage pick-up from the tarmac. Mr. Zafar felt that the way CN required him to do his work constituted a "danger" because there was a risk for him to slip due to bad weather, winter and poor lighting conditions coupled with the speed required to complete the task. Mr. Zafar wanted to do cleanup and tarmac pick-up his way because he felt it was safer for him. According to him pick-up at 06:00 hours was unsafe and unhealthy because it subjected him to tripping hazards, to walking on tracks with oil and gravel and, walking on ice, water and snow; it exposed him to cold air which irritated his lung infection and made him cough; it intensified knee problems which prevented him from walking. Other causes of concern for him were the sometimes inclement weather conditions, the hurried up pace required to place the bags into the moving pick-up truck, and seating three persons into the truck with only two seat belts.

Mr. Zafar wanted to do tarmac pick-up from inside the train. He could walk inside the length of the train, step down onto the tarmac, do both sides of the tarmac, then step back up, continue to walk through the coach, step down to the other side of the tarmac. This could only be done when the trains were parked in the yard for servicing between runs. Mr. Zafar felt that it was safer for him to do garbage pick-up this way because he could walk in the trains to get at the garbage bags. He did not therefore have tripping hazards, he did not have to expose himself to the cold, he did not have to rush, and his lung infection, coughing and pain in his left knee was thus prevented because of less exposure to the cold and winter weather conditions.

## II

GO Trains are parked in the storage yard for servicing between runs. Cleaning the interior of the cars of garbage is one component of servicing. As garbage bags fill,

cleaners dispose of them outside the rail cars onto the tarmac close to the coach to prevent tripping and blockage. The operation of picking up the garbage bags from the tarmac requires cleaners to walk along the tarmac, pick them up and place them into the back of a moving pick-up truck driven by the lead hand. This portion of the task is rotated among the cleaners and each is required to perform this task about once a week. Upon completion of this component of the task, the bags are then taken in the truck and disposed of into an industrial disposal bin.

CN requires that the pick-up process begin at 06:00 hours, after the departure of trains from the service yard, so that cleaners have adequate time to complete cleaning of coach interiors. If garbage pick-up were to commence earlier, there would have to be a return to the area for additional garbage bags. The operation of picking up the garbage bags from the tarmac and putting them into the back of the pick-up truck usually takes between 10 to 20 minutes. Volume and weather conditions can affect the time frame.

A tarmac provides a pathway between trains on tracks or empty track beds on either side. There are seven tarmacs to service eight rail beds. Paved roadway paths at each end and between the East and West service yards allow for the crossing over the tracks onto the other tarmacs without having to cross directly over the rail tracks. A canopied area separates the East and West service yards.

\*\*\*\*\*

Canadian Railway Operating Rules (CROR) protect all rail employees against accidents if they are respected and followed by all employees. All CN personnel are trained and are required to understand, observe and obey all signal regulations as a condition of employment. All employees are familiarized with these rules. Appropriate CROR signals must be used at all times.

One such rule is the blue flag rule. A blue flag and in hours of darkness a blue flashing light must be displayed on the board at each end of the track to advise that work is in progress by workmen in the vicinity. When such signals are displayed, equipment must not be coupled or moved. As extra precaution nullifiers are placed while trains are parked in-dock, to prevent rolling. When no such signals are displayed this indicates that no workmen are working in the vicinity of equipment and that the equipment may be coupled or moved. Only those employers who are required to do the work are entitled to post the blue flag at the commencement of their work and to remove upon completion of their work. This is required where employees work on a track or on a car on a track. Those employees who may move cars on that track must follow all rules and obtain clearance prior to any movement.

Trains start to leave servicing area at 04:30 hours and by 06:00 hours the trains have left the service yard.

### III

At approximately 08:45 hours on January 26, 1995, Dave Horrox, Manager, Toronto North, Labour Canada, received notification of a work refusal at the Willowbrook Go Station in Etobicoke. Safety officer Mariana Grinblat was assigned to investigate the work refusal. Ms. Grinblat arranged to conduct an investigation on January 27, 1995 with Mr. John McPherson, Willowbrook Go Rail Supervisor, and requested that Mr. Zafar stay at the workplace until she could arrive to investigate the work refusal.

In attendance with the safety officer on January 27, 1995, were Mr. Frank O'Neill, CN Equipment Officer, Mr. John McPherson, CN Safety Supervisor, and Gerald Day Health and Safety Committee Union Representative and Co-Chair. Mr. Zafar left the workplace upon completion of his scheduled shift at 07:00 hours. The safety officer's investigation included obtaining the names of the people involved and present at the moment of the work refusal, the names of the members of the Safety and Health



Committee, and the names of the supervisors. The garbage detail pick-up work procedure as required by CN was examined and discussed.

Ms. Grinblat later spoke with Mr. Zafar over the phone regarding his work refusal and made arrangements with him to observe him undertake his preferred work procedure on February 2, 1995. She returned to the Go Station on February 2, 1995 at 05:30 hours. On her arrival, Mr. Zafar had already completed this task. He did a simulation of his preferred method and he explained why he felt the procedure as required by CN was unsafe. Mr. Dave Wylie, Shift Supervisor, Mr. John McPherson, CN Safety Supervisor, and Mr. Gerald Day and Vance Atkinson, Health and Safety Committee Union Representatives, were in attendance as well. Ms. Grinblat also spoke and listened to other cleaners with respect to the required work procedure.

Her investigation revealed that on January 19, 1995, Mr. Zafar refused to do garbage pick-up as required by a supervisor new to the work area. This supervisor required that the pick-up begin at 06:00 hours. An investigation in accordance with section 128(7) was undertaken. Mr. Atkinson was Mr. Zafar's representative during this work refusal. His notes indicate that Mr. Zafar said he would continue to do garbage pick-up his way and would bring the matter to the next health and safety meeting for discussions. Mr. Zafar did not pursue this work refusal any further. On January 23, 1996, Mr. Zafar requested an update about piling of garbage bags.

Mr. Zafar then raised the matter of garbage pick-up on the midnight shift at a Health and Safety Committee Meeting on January 25, 1995. Messrs. Atkinson and Day were in attendance. Minutes of this meeting indicate that the matter of garbage pick-up had been previously discussed. It was agreed to review the garbage pick-up procedure on Friday, January 27, 1995 at 05:00 hours.

On January 26, 1995, Mr. Zafar exercised his right to refuse. Other coach cleaners assigned to garbage detail were informed of the work refusal. They chose to complete

the work assignment. In accordance with section 128(7), an investigation was undertaken by the employer in the presence of Mr. Atkinson and Mr. Zafar. Mr. Zafar continued to refuse to work after this investigation. Labour Canada was called and information was given to David Horrox over the telephone.

These matters as well as working conditions, weather conditions, the work area, track conditions, train movements, viability, and any other complaints were considered. Ms. Grinblat noted that Mr. Zafar expressed concerns about slippage and winter conditions; no concerns were expressed about train movements or about health conditions to the safety officer. None of the other cleaners complained about any safety factors or concerns with respect to the required garbage pick-up procedure.

Ms. Grinblat advised verbally that inspection of the site did not reveal any conditions which would constitute a danger to Mr. Zafar. She also advised that she would review her investigation procedure and the facts and information with her supervisor, Mr. Horrox. Following her investigation and review, Ms. Grinblat concluded that the way CN required the work to be done was safe whereas the procedure Mr. Zafar wanted to use was not safe. The work procedure favoured by Mr. Zafar's violated the CN blue flag safety rule because there is no blue flag protection in effect during the period of time Mr. Zafar prefers to do garbage pick-up. On February 6, 1995, Ms. Grinblat confirmed her verbal decision in writing.

#### IV

Mr. Zafar, an active member of the Safety and Health Committee, believes strongly that it is his responsibility to see that work and working conditions are done safely and are improving. He believed that he saw many things being done unsafely and as a safety representative he felt he had to take action with respect to these matters.

He contends a number of issues about the safety officer's investigation: 1) his work refusal had nothing to do with taking garbage bags out of the truck; 2) he never took issue about railway crossings but rather that snow is not properly cleared; 3) if the safety officer wanted to see Mr. Zafar in the performance of his duties, she would have to be at the work location before 6:00 hours; 4) her inquiry of other coach cleaners was not done in either his presence or in Mr. Atkinson's presence.

Mr. Zafar submits that doing the garbage pick-up detail at 06:00 hours during the winter time is unsafe because people are hurrying between the tracks on loose gravel covered with snow, ice, or water to get to the garbage on the tarmacs. He has brought this matter to the attention of various supervisors and to the Health and Safety Committee on previous occasions but to no avail. Mr. Zafar felt he had no choice but to take this route under the Code. He feels that as a safety representative, he has to do something to improve what he considers to be an unsafe practice.

## V

The Board's jurisdiction with respect to a referral of a safety officer's decision is set out in section 130(1) of the Code. The Board directs itself to the nature and to the sufficiency of the consideration the safety officers give to the existence of danger at the time of their investigation and to the safety issues involved in the work refusals.

There is a certain degree of danger in most occupations and risk of injury or inherent danger varies from industry to industry. Additionally conditions which are normal or inherent to work varies from job to job and industry to industry. Weather conditions are inherent in the nature of Mr. Zafar's work.

Employers have a right to manage their workforce, assign work and determine work methods and standards subject to collective agreement and statutory provisions. The nature of Mr. Zafar's work can expose him to all weather conditions. To use the

right to refuse to work under Part II of the Code in this context is not its intended use. Part II was not intended to allow employees to refuse work assignments for personal reasons or preferences. Nor can these provisions be used as a vehicle for resolving labour issues or for promoting other agendas.

Sections 128 and 129 of the Code allow individuals to exercise a right to refuse to work as an emergency measure for situations where employees are faced with immediate danger and they need to withdraw from danger as defined by the Code.

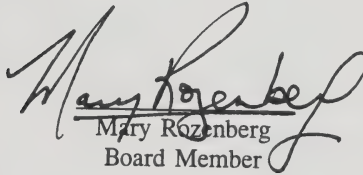
Section 129(1) of the Code places an obligation on a safety officer to investigate forthwith a work refusal in the presence of the employer and the employee or the employee's representative upon receipt of notification of a work refusal. The safety officer conducted an investigation of Mr. Zafar's work refusal on January 27, 1995 in the presence of a union representative, Mr. Day a carman, a Health and Safety Committee Union Representative and Health and Safety Co-Chair. The union representative may not have been the person chosen by Mr. Zafar, but this does not invalidate the safety officer's investigation in accordance with the Code.

Safety officer Grinblat conducted an investigation into Mr. Zafar's work refusal on January 27 in accordance with section 129(5). She returned and continued her investigation on February 2, 1995. Although she did not have the opportunity to observe the work procedure, she did review the garbage pick-up procedure as required by CN and as preferred by Mr. Zafar. Her inspection of the site did not reveal any conditions which would constitute a danger within the meaning of the Code. She reviewed her investigations with her supervisor. She made a finding that a condition of danger did not exist with respect to the procedure as required by CN.

Section 129(5) provides that where a safety officer makes a finding of no danger, an employee is not entitled to continue to refuse under section 128.



Having considered the particular circumstances of this referral, nothing was adduced that would lead the Board to conclude that important or relevant matters were overlooked or improperly considered by the safety officer. The Board therefore confirms the safety officer's decision.



Mary Rozenberg  
Board Member



# information

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## Summary

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Stephen Gill et al., *complainants*, 113239 Canada Ltd., carrying on business as Hill's Limousine Service, *respondent*, and International Brotherhood of Electrical Workers, Local 228, *bargaining agent*.

Board File: 745-5229  
CLRB/CCRT Decision no. 1184  
October 4, 1996

## Résumé

Stephen Gill et autres, *plaignants*, 113239 Canada Ltd., exploitée sous la raison sociale Hill's Limousine Service, *intimée*, et Fraternité internationale des ouvriers en électricité, section locale 228, *agent négociateur*.

Dossier du Conseil: 745-5229  
CLRB/CCRT Décision n° 1184  
le 4 octobre 1996

Five experienced chauffeurs employed with a limousine service company complained, pursuant to section 94(3)(a)(i) of the Code, that their Employer was discriminating against them because of their membership in or participation in the administration of a trade union. They alleged that the Employer had for many months been reducing their work hours, by distributing work to less experienced drivers hired after the trade union's application for certification.

Cinq chauffeurs expérimentés qui travaillent pour un service de limousine ont déposé une plainte en vertu du sous-alinéa 94(3)(a)(i) du Code, alléguant que leur employeur faisait preuve de discrimination à leur égard en raison de leur adhésion à un syndicat ou de leur participation à l'administration d'un syndicat. Ils allèguent que l'employeur réduisait depuis des mois leurs heures en distribuant le travail à des chauffeurs qui étaient moins expérimentés et qui avaient été embauchés à la suite de la demande d'accréditation du syndicat.

The Board found that the Employer's explanation for the decreased work hours of the Complainants did not meet the burden of proof imposed by section 98(4) and, further, that the Employer had been discriminating against the Complainants on a continuing basis. Although the Employer was under no obligation to assign work in a particular way, the dispatching system in use granted dispatchers full discretion to decide to whom to assign work. The system was amenable to arbitrary conduct, and the evidence satisfied the Board that it had been applied to frustrate

Le Conseil conclut que l'explication de l'employeur concernant les heures de travail réduites des plaignants ne satisfaisait pas le fardeau de la preuve imposé par le paragraphe 98(4) et que l'employeur faisait preuve de discrimination à l'égard des plaignants de façon continue. Bien que l'employeur ne soit pas tenu de distribuer le travail d'une façon en particulier, la méthode de répartition utilisée laissait les répartiteurs entièrement libres de décider à quel chauffeur attribuer le travail. Cette méthode pouvait donner lieu à une conduite arbitraire, et la preuve a convaincu le

the hopes of drivers who supported the trade union's certification and collective bargaining efforts.

If a person files a complaint within 90 days of first knowing of a continuing violation, the complaint is timely and the person may recover for all losses which may have been suffered from the outset of the violation. However, if a person does not file a complaint within 90 days of first knowing of the violation and the violation continues, a complaint may still be made because each time the employer repeats the violation, it creates a new cause of action. The complainant will, however, by virtue of the provisions of section 97(2) of the Code, be precluded from claiming for losses which occurred in the period prior to the 90 days before the complaint was made and the remedy will be restricted to the losses, if any, which occurred in the 90 days immediately preceding the filing of the complaint.

The Board determined that in the circumstances of this case, the Complainants' remedy was limited by section 97(2) to the most recent period of discrimination, i.e., the 90 days prior to the filing of the complaint. The Board established a formula to calculate income losses in the 90-day period and further awarded, as part of the loss, interest calculated by the "rough and ready" method, previously adopted by this Board in Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRBR no. 527).

Conseil que la méthode avait été appliquée afin de décourager les chauffeurs qui appuyaient l'accréditation du syndicat et les tentatives de négociation collective.

Si une personne dépose une plainte dans les 90 jours suivant la date à laquelle elle a eu connaissance d'une violation continue, la plainte est recevable, et la personne peut recouvrer les pertes subies depuis le début de la violation. Cependant, si une personne ne dépose pas de plainte dans le délai de 90 jours et la violation continue, une plainte peut toujours être déposée parce que chaque fois qu'il y a une violation, cela crée une nouvelle raison de porter plainte. Cependant, le plaignant ne pourra, aux termes des dispositions du paragraphe 97(2) du Code, demander un dédommagement pour les pertes subies dans la période qui a précédé la période de 90 jours avant le dépôt de la plainte. Tout redressement ne portera que sur les pertes subies dans la période de 90 jours qui a précédé immédiatement le dépôt de la plainte s'il y a lieu.

Le Conseil conclut que, aux termes du paragraphe 97(2), le redressement des plaignants se limite dans les circonstances de la présente affaire à la plus récente période de discrimination, c'est-à-dire, la période de 90 jours qui a précédé le dépôt de la plainte. Il a élaboré une formule en vue de calculer les pertes de revenus dans une période de 90 jours et a accordé, comme faisant partie du dédommagement, l'intérêt calculé par la méthode «simple et rapide», adoptée par le présent Conseil dans une décision antérieure.

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## Reasons for decision

Stephen Gill et al.,

*complainants,*

*and*

113239 Canada Ltd. carrying on business as  
Hill's Limousine Service,

*respondent,*

*and*

International Brotherhood of Electrical Workers,  
Local 228,

*bargaining agent.*

Board File: 745-5229

CLRB/CCRT Decision no. 1184

October 4, 1996

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The Board was composed of Mr. J. Philippe Morneau, Vice-Chair, and Ms. Véronique L. Marleau and Ms. Sarah E. FitzGerald, Members. A hearing was held on June 5, 6 and 7, at Ottawa.

### Appearances

Mr. Stephen Gill, on his own behalf and on behalf of Messrs. Ron McConnell, Jack L'Abbe, Damien Fleurs and Stéphane Ranger, complainants; and  
Mr. Andrew B. Lister, for the respondent employer.

These reasons for decision were written by Ms. Sarah E. FitzGerald, Member.

### I

On November 28, 1995, five employees filed an unfair labour practice complaint against their employer, Hill's Limousine Service ("Hill's" or the "Employer"). Jack

L'Abbe, Stephen Gill, Damien Fleurs, Ron McConnell and Stéphane Ranger (the "Complainants") allege that contrary to section 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations), the Employer has been discriminating against them by reducing their hours of work and consequently their incomes. They say that Hill's is doing so because of their membership in or participation in the administration of a trade union, in this case the International Brotherhood of Electrical Workers, Local 2229 ("IBEW").

Section 94(3)(a)(i) of the Code states:

*"94. (3) No employer or person acting on behalf of an employer shall*

*(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person,*

*(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union, ..."*

IBEW filed an application for certification in May 1994. In July 1994 the Board certified the trade union to represent a bargaining unit of Hill's chauffeurs, chauffeur/dispatchers and chauffeur/driver trainers. The Complainants say that prior to the May 1994 application, and as the more experienced drivers employed at Hill's, they received more work hours. They allege that Hill's has reduced their hours of work since May 1994 by assigning work to less experienced drivers hired,

- \* after IBEW's May 6, 1994 application for certification,
- \* after IBEW's September 1994 Notice To Bargain,
- \* after Hill's created the position of Assistant Manager in October 1994, and
- \* in November 1995.

The Employer denies harbouring anti-union feelings and maintains that the hours of all drivers were reduced when it lost a major contract representing 70% of the company's business. Hill's says that it distributed the remaining work hours among its drivers as equitably as possible, subject to their availability. The Employer says it did so to maintain the interest of all drivers in working for Hill's. Hill's describes all of its drivers as "essentially casual".

In the Employer's view, an award of lost income to the Complainants will in effect, establish a system of driver seniority that has never existed at Hill's and that IBEW has not to date, succeeded in obtaining through bargaining.

## II

Certain matters raised by the parties during the hearing may be briefly stated.

### 1. Exclusive representation by certified bargaining agent.

The Employer challenged the fact that IBEW did not file this complaint on behalf of the named employees, nor did it appear as an interested party at the hearing. Stephen Gill, one of the Complainants, represented the five employees before the Board.

Although this type of complaint is usually filed on an employee's behalf by a trade union, the Code does not prevent employees from filing their own complaints. Section 97(1) of the Code allows "any person or organization" to make such a complaint. The right is not restricted to trade unions.

### 2. Issue estoppel.

The Employer claimed that its hiring of new drivers following the application for certification should not properly form part of the complaint. Prior unfair labour practice complaints filed at that time by IBEW had since been settled and withdrawn.

The Employer argued that as the wording of the settlement purports to extinguish any claims concerning matters giving rise to those earlier complaints, its hiring activity then could not now be raised in a complaint by individual employees.

The Employer suggested alternatively, that if IBEW was masterminding the current complaint from behind the scenes, it would be improper to allow hiring activity which had been the subject of a settlement with the trade union to form part of a subsequent employee complaint.

The testimony of Mr. Paul Morse, IBEW's Assistant Business Manager revealed that Stephen Gill spoke with Mr. Morse from time to time about the current complaint, but did not suggest that IBEW was in the background, directing the matter.

In practice, the possibility of overlapping complaints does not often arise as section 97(2) of the Code requires that a section 94 complaint be filed in a timely manner:

*"97(2) ... shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."*

(emphasis added)

The Complainants say that they filed their complaint within 90 days of first realizing a continuing discrimination was being carried out against them. Therefore, in their view not only is the complaint timely within the meaning of section 97(2), but in addition, the appropriate period to remedy income loss should date back to the May 1994 application for certification.

### III

A section 94(3) complaint attracts the reverse onus of proof set out in section 98(4):



*"98(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."*

(emphasis added)

As discussed in Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600), the employer is usually the only person who really knows the reason for its actions and this is why Parliament gave section 94(3) meaning by shifting the burden of proof. The freedom to join a trade union and to participate in its lawful activities is an important right afforded by the Code. In consequence, section 98(3) requires that an employer satisfy the Board that the actions complained of were not motivated in any way by anti-union animus.

A passage from the Board's decision in Yellowknife District Hospital Society et. al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82) is frequently cited in this regard. Although that case concerned employee terminations, the principles apply to any complaint alleging discriminatory treatment in employment because of anti-union animus.

*"... Discrimination can be most subtly practised and labour relations boards' decisions are replete with examples of ingenious employer actions designed to thwart the exercise of employee's rights to participate in union activity. Persons who practice discrimination determined by society, through its legislators, to be an unwanted element of our social fabric should not be relieved from the remedies afforded those who are discriminated against because they can offer another reason for [the actions complained of]. The presence of a second or more reasons does not remove the taint of discrimination from their act. It does not engender a sense of equality or freedom in those whom the legislation seeks to protect. It does not encourage the social climate which the anti-discrimination legislation seeks to promote. Quite the contrary, it encourages deception, rewards the skilful manipulator in human relations and probably creates a more destructive form of discrimination. For those discriminated against, statutory remedies*

*become meaningless and self-help in many hostile or other undesirable forms becomes the only recourse.*

*. . . It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act . . . They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1) [now 8(1)]. To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is one contemplated by section 184(3) [now 94(3)], he will be found to have committed an unfair labour practice."*

pages 284-285; and 460-461; (emphasis added)

In summary, if Hill's evidence does not satisfy the Board that the Employer's actions were devoid of anti-union animus, the presumption in section 98(4) remains operative, and the Employer will be found to have violated section 94(3).

#### IV

In presenting its case, Hill's initially called as witnesses Sharon Turner, the General Manager and Ken Jones, former Operations Manager. Ms. Turner, a former Manager, became General Manager in early 1994 and reports to the President, Mr. Ayers. She hires drivers and oversees daily operations. The positions of Operations Manager (when it was staffed) and Assistant Manager (once created) report to her.

Ms. Turner gave the following testimony. She hires people-oriented drivers who have flexible schedules. Drivers know they are hired on a part-time, "as needed" basis. There are no guaranteed hours and no maximum number of hours. There has never

been "full-time" work. Hill's maintains on average a pool of about 30 drivers to meet its needs. There is a high turnover in drivers because of the nature of the work and part-time hours. Many drivers do not appreciate what the job entails and soon after hiring, seek out full-time work. Drivers frequently complain to management about receiving too few hours.

Ms. Turner explained the significance a single contract can have for Hill's. In 1993, Hill's obtained a contract with Lufthansa for the Ottawa-Mirabel Airport run. This required three to nine trips per day. "At one point" (upon which Ms. Turner did not elaborate), this contract accounted for 60% of the Company's hours. In late October/early November 1995 (about one month prior to the filing of this complaint), Hill's received three months' notice from Lufthansa that the contract would terminate in January 1996. Ms. Turner says the loss of that work has never been replaced.

Ms. Turner also noted that in June 1994 (one month after the application for certification), Lufthansa ceased paying for stand-by driver hours, and that this affected in particular the work of Stéphane Ranger (a Complainant). June 1994 was however a particularly busy month, and Ms. Turner stated that Hill's almost doubled its complement of drivers in order to service the transportation needs of a visiting Argentinean delegation for one week.

Ms. Turner agreed that the Employer's records show that only 7 of 35 drivers employed at the time of the May 1994 application for certification were still employed in November 1995 when the complaint was filed.

With respect to the creation of the Assistant Manager's position, Ms. Turner explained that in October 1994, Hill's hired Ms. Dale Culley. The Employer had decided that for security reasons, it required more of a management presence at its operations. IBEW did not dispute the creation, duties or staffing of the Assistant Manager's position. Ms. Culley was one of the drivers hired by Hill's about six months earlier, following the application for certification. The position was offered first to Stephen

Gill (a Complainant). Ms. Turner knew that he declined because of an ongoing commitment to trade union matters. Mr. Gill and Mr. L'Abbe (another of the Complainants) were known members of the team negotiating a first collective agreement.

Ms. Turner further testified that before Ms. Culley's hiring as Assistant Manager, Ken Jones, the Operations Manager, did the dispatching. He was assisted by a number of drivers acting as relief dispatchers. After Ms. Culley's hiring and until Mr. Jones was laid off in January 1996 (about two months after the filing of this complaint), they shared the dispatch function. With one exception, drivers were no longer asked to work as relief dispatchers.

Ms. Turner is still called upon on occasion to do dispatch work. In her opinion, the system at Hill's does not ensure that work is equally distributed among the drivers. The main or senior drivers are given a certain number of hours; that is, those drivers who have worked for Hill's for about a year and who know the cars and the business receive the first offers and are called for all sorts of work. However, she believes that all drivers are offered work to keep them busy.

One to two days in advance, the Hill's dispatcher schedules drivers to satisfy the bookings. Ms. Turner says the key is to "cover the work with qualified, suitable drivers". The dispatcher assesses driver availability from monthly posted sheets upon which drivers indicate available dates. Drivers also verbally advise dispatchers of circumstances affecting availability. Over time, the dispatcher "gets a feeling" for each driver's availability and preferred work.

Ken Jones, former Operations Manager, gave the following testimony concerning his dispatching practices while employed at Hill's. The length of a driver's employment was not a factor. He dispatched based on availability, something he "got a feel for over time". He telephoned drivers in alphabetical order. Whoever called back first



was given the assignment. Sometimes he would schedule a specific driver if the booking came from a steady client with whom the driver had developed a rapport.

Mr. Jones explained that he tried to give all drivers a minimum of 30 hours per week. He recalls that Mr. Ayers, President, had on a few occasions over the years, discussed a restriction of driver hours. Sometime in 1993, Hill's drivers complained about uneven work distribution. However, it was not until Hill's began hiring more drivers "in the 1994-1995 period" that Mr. Ayers told him to restrict all drivers to 30 hours per week.

## V

Anis Kiani, a former Hill's chauffeur, testified on behalf of the Complainants. Mr. Kiani started driving for Hill's in September 1994 and quickly developed a friendship with Ms. Culley, the new Assistant Manager. They lived in the same neighbourhood and drove to and from work together in Ms. Culley's car. On occasion they enjoyed a social drink together.

Mr. Kiani testified that Ms. Culley told him that in doing her dispatch work, she was restricting driver hours because the union campaign was hurting both the Employer and the newer drivers. Hill's wanted to get rid of drivers who supported the union. She named a "Steve", "Damien", "Jack", "Ron", "Carol" and "John" in this regard. Mr. Kiani also says that on at least two occasions, Ms. Culley told him that she preferred to give work to him or "Alan" rather than to "those union guys", and that she described him as one of the "nice" guys.

Believing the union was not in his best interests, and in the Board's view, seeking to benefit from the situation, Mr. Kiani offered to help get rid of the union. He was told to keep his eyes open and report back to the office. Mr. Kiani testified that in January 1995, Mr. Ayers told him that he would take care of him if he wrote an incident report that helped Mr. Ayers to suspend Stephen Gill. Mr. Kiani understood

this to mean that he would be dispatched to the better bookings, and perhaps receive limousine work. Mr. Kiani agreed to write the letter and says that Ms. Culley told him what to write and Ken Jones typed it. Mr. Gill was suspended. Mr. Kiani admitted before the Board that he knew that the letter he signed contained false statements.

Mr. Kiani testified that a few months after this January incident he complained about a decrease in hours and the distribution of work. He says that Ms. Culley told him the following. Business was slow and it was the fault of the union guys that he was not getting more hours, because Hill's could not fire them. Mr. Kiani was already receiving preferential treatment but the union guys had to get some hours, although they were being given the less desirable bookings. He recalled her giving him an example of dispatching Mr. Gill on a Toronto run that did not pay for all hours he had to wait with the limousine.

Mr. Kiani testified that he experienced a change of heart in "late spring" of 1995. At this time and again "in the summer" of 1995, he exchanged information about his past earnings at Hill's with drivers who support the trade union. From the information he gathered, it was clear to him that he had been receiving preferential treatment.

For reasons not material to this case, Mr. Kiani left Hill's employ in the fall of 1995.

## VI

In rebuttal testimony Ms. Culley the Assistant Manager denied the anti-union comments attributed to her by Mr. Kiani. In her view, Mr. Kiani was initially friendly to her because he wanted to ride to and from work with her. When he finally purchased his own car, he pressured her as a friend for more hours because of car payments. After a few months, she tired of his repeated complaints about insufficient hours. Their friendship soured.

Ms. Culley testified that she was told upon being hired, to distribute the hours equally among drivers, about 30 hours each. She says however that the 30-hour rule is not cast in stone and it is not a problem to exceed that number. Ms. Culley mentioned a book in which she maintains a running total of each driver's hours. She says that she telephones those drivers with the fewest hours first, if they show as being available.

Ms. Culley identified a number of factors affecting her dispatching practice. In scheduling drivers, Ms. Culley considers: 1) Driver availability marked on the posted monthly sheet. Using this sheet Ms. Culley telephones drivers and if necessary, leaves messages. The first driver to call back within a certain time limit receives the booking. 2) Block booking where convenient. For example, rather than calling a driver for a short assignment, Ms. Culley may give the booking to a driver who is already scheduled that day and who will finish around the required time. 3) Clients may request a specific driver. Sometimes, even if the driver is "booked off", Ms. Culley telephones to ask if the driver will take the assignment. 4) Driver preference for certain types of assignments. 5) Driver qualifications. Ms. Culley assesses which drivers are more qualified to do the work. She explained that she favours the more senior or experienced drivers, that is, drivers who can be dispatched without restriction to any type of call. She considers all of the Complainants to be experienced drivers as well as a number of drivers hired since the application for certification. Ms. Culley confirmed however that ultimately, the matter of which driver is assigned to a particular booking lies completely within her discretion.

## VII --Determinations

### Merits of the Complaint

The testimony and documentary evidence satisfies the Board that following the May 1994 application for certification and a busy period in June 1994, the Employer

introduced changes in its dispatching practices which were not communicated to the drivers.

The Employer says that there were fewer work hours to distribute because of the loss of a major contract, but the evidence did not show what contract the Employer was referring to. The Lufthansa contract work did not finish until January 1996, after the filing of the complaint. Testimony concerning the loss of stand-by driver hours gave no indication of the number of lost hours or drivers affected, nor whether any new business subsequently made up for this loss. With respect to the testimony about the hiring of many new drivers in June 1994 to provide services to a visiting Argentinean delegation, the pay records do show that June 1994 was a busy month for Hill's drivers. But neither Ms. Turner nor Mr. Jones provided a satisfactory explanation for the Employer's decisions to retain after June, all of the newly hired drivers and to modify the dispatching practice in order to distribute work more evenly over the enlarged driver group. The Employer claimed a loss of overall business and therefore fewer work hours to distribute, but the pay records show little variance in the gross amount paid to the driver group as a whole in the months prior to the May 1994 certification application, and in the months after the busy June 1994, for example, July to November 1994. What did change was the manner in which the work hours were distributed among the drivers. In short, the Board finds that the Employer's explanation on this point is insufficient. Furthermore, it does not stand up to scrutiny.

The pay records requested by the Complainants reveal that over time certain drivers who had enjoyed a consistent level of earnings prior to the May 1994 application for certification (including the majority of the Complainants as top earners), saw their earnings begin to fluctuate and/or decline. As the months passed, many of the drivers employed at the date of the certification application left Hill's employ, and were replaced through new hirings. The Employer's evidence does not satisfy the Board that the departure of so many employees in the May 1994 - November 1995 time period was usual for its operations. Given the nature of the complaint and the burden



of proof, a single statement by Ms. Turner that there is a high turnover in the industry is insufficient.

Certainly the dispatch system at Hill's is amenable to arbitrary and discriminatory action. Employer witnesses gave contradictory testimony concerning dispatching methods and restrictions on work distribution. In the Board's view, a system granting a dispatcher the discretion to determine -- which drivers to telephone first for bookings and the time of day to place those calls, the amount of time a driver will be given to respond to any telephone message left, whether a booking should be added on to work already assigned to a particular driver, which drivers a client prefers, and the type of work certain drivers prefer or dislike -- is a system that can easily be manipulated to discriminate against those supporting or participating in trade union efforts. Ultimately, no matter what criteria are stated or may be set out on paper, it is clear that Hill's dispatchers retain total discretion to assign the work to whomever they please.

The Board accepts Mr. Kiani's evidence of an anti-union animus among Hill's management. Both Mr. Kiani's and Ms. Culley's credibility were certainly in issue given the damaging nature of Mr. Kiani's testimony and the conflicting testimony of Ms. Culley. Mr. Kiani spoke forthrightly, withstood a rigorous cross-examination, and revealed to the Board's satisfaction the reasons for his actions. The Board finds him to be a credible witness and prefers his evidence to Ms. Culley's where there is conflict. Moreover, pay records do show changes in driver earnings that are consistent with the actions Mr. Kiani says Ms. Culley spoke of. Finally, Ms. Culley's answers to Board questions about the application of the various dispatching factors she identified were in the Board's view, evasive or non-responsive.

The only pay records available to the Board that show driver earnings in the time period Prior to the Application for Certification (the "PAC" Period), were pay records for the immediately preceding four months: January to April 1994. These PAC Period records show that four of the five Complainants were consistently among a

group of about six drivers earning the greatest earnings. In comparison, in a four-month period leading up to the filing of the complaint -- July to October 1995 (the "Reference Period") -- only one Complainant consistently remained in the group of top earners. The Reference Period is discussed further below.

The change in four of the five Complainants' earnings "rankings" (if we may use that term) between the PAC Period and the Reference Period is shown below:

<u>Range of PAC Monthly Rankings</u>	<u>Range of Reference Period Monthly Rankings</u>
Ron McConnell: 2nd - 3rd	1st - 4th
Steve Gill: 3rd - 4th	8th - 10th
Damien Fleurs: 2nd - 5th	6th - 9th
Jack L'Abbe - 4th to 6th	6th - 11th.

More specifically, the Board noted from the pay records that:

\* The amount of each Complainant's gross earnings in the January-April 1994 PAC Period, and the amount of gross earnings for the bargaining unit driver group as a whole in those months were reasonably steady. Consequently, the earnings rankings enjoyed by the Complainants as between each other and in comparison with the driver group as a whole were also steady. The consistency permits the Board to draw conclusions about the usual earnings of the Complainants in the PAC Period.

\* The Board compared earnings in the four-month PAC Period with earnings in a four-month Reference Period that does not include November 1995, even though this was the month in which the complaint was filed. Driver earnings decreased markedly in November 1995 at which time the parties had reached the stage of legal strike or lockout in their bargaining. Having regard to the Employer's explanation for its work distribution that month, the Board decided against including November

1995 in the Reference Period for the purpose of assessing similarities to or differences from earnings from the PAC Period.

In the Reference Period, gross earnings for the bargaining unit driver group as a whole were also reasonably steady, but the proportion of each Complainant's earnings had decreased when compared to proportions in the PAC Period. Two other drivers working at Hill's in the PAC period had, over time, moved into the top earners group. In the Reference Period, these two drivers showed gross monthly earnings around or well above their PAC earning levels, despite the Employer's assertion that it was distributing work more equally over the entire driver group. Further, three drivers hired after the certification application were, by the time of the Reference Period, consistently among the top earners.

The Board finds, having regard to all of the evidence, that Hill's has not met the burden of proof imposed upon it pursuant to section 98(4). The reasons given by the Employer for changes to its dispatching procedures do not withstand scrutiny. Moreover, in accepting Mr. Kiani's evidence of anti-union animus, the Board concludes that the dispatching changes were deliberately made to frustrate the hopes of drivers who support IBEW's certification and collective bargaining efforts. It was no secret to Hill's that the longer-term employees were seeking seniority recognition in a first collective agreement.

Although the Employer is under no obligation, statutory or otherwise, to assign work in a particular way, in the present case, the dispatching system has been used to discriminate against employees who exercised their rights to participate in union activities.

We find that the Employer has on a continuing basis, acted upon changes in dispatching of which the drivers were not notified, and further, that the Employer has targeted certain drivers negatively. In consequence, other drivers have been affected positively. It would not be surprising if certain drivers were given more hours in a

deliberate attempt to curry favour with those thought not to be union supporters or capable of being swayed.

### Appropriate Period of Remedy

If a person files a complaint within 90 days of first knowing of a continuing violation, the complaint is timely and the person may recover for all losses suffered from the outset of the violation.

However, if a person does not file a complaint within 90 days of first knowing of the violation and the violation continues, the person may still make a complaint because each time the Employer repeats the violation, it creates a new cause of action. The complainant will however, by virtue of the provisions of section 97(2) of the Code, be precluded from claiming for losses which occurred in the period prior to 90 days before making of the complaint. The remedy will be restricted to the losses if any, which occurred in the 90 days immediately preceding filing of the complaint. This is precisely the case before us.

The only evidence concerning the timing of any of the Complainant's knowledge of the ongoing discrimination came from Mr. Kiani who testified that in late spring and again in the summer of 1995, he exchanged information about earnings with drivers supporting the union. The Board finds that the complainants knew or ought to have known at that time, of the Employer's conduct they subsequently chose to complain of in November 1995, but also that the Employer was continuing in its discriminatory practices throughout this time. Accordingly, a remedy may be granted but only for income losses in the 90-day period preceding the filing of this complaint.

### VIII - Remedy

Assessing income loss proved a difficult task. The Employer did not refer to the work hour and pay records in an attempt to show the Complainants' claims were



false. Nor did the Complainants identify any useful manner by which income losses could be calculated.

In these circumstances, to assess income loss in the 90-day period prior to the filing of the complaint, the Board finds it logical to notionally negate the effects of the changes in dispatching and driver targeting. The Board finds it appropriate to calculate the average of the monthly percentages over the four-month PAC Period, of each Complainant's gross earnings as a percentage of the gross earnings for all bargaining unit drivers in each of those months. We shall refer to this as the "PAC Percentage". The PAC Percentage may then be applied to the gross earnings for the bargaining unit drivers in the three months prior to the complaint; September, October and November 1995. For purposes of this decision, these three months shall be treated as the "Remedy Period".

The Board recognizes that the three calendar months of the Remedy Period do not exactly match the 90 days for which the Board wishes to grant a remedy, i.e., August 30 to November 28, 1995. Nonetheless, we are satisfied that monthly pay records for these three months are sufficiently representative to provide the basis to award income loss.

Accordingly, in the case of Stephen Gill, Jack L'Abbe, Damien Fleurs and Ron McConnell, the Board awards as income loss, the difference between the amount calculated in applying each Complainant's PAC Percentage to the gross earnings of all bargaining unit drivers in the months of the Remedy Period and, the amount of gross earnings actually earned by the Complainant in the Remedy Period. In adopting this approach, the Board did consider evidence of driver availability in the Remedy Period and the Employer's explanation for its work distribution in November 1995.

Mr. Stéphane Ranger's situation differed. Not all of his income loss since the PAC period can be attributed to the Employer actions at issue here. Uncontradicted

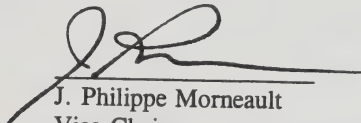
testimony of Employer witnesses established that Mr. Ranger holds full-time work elsewhere and is only available to work for Hill's on weekends and evenings. Shortly after the certification application, Mr. Ranger's hours of work decreased dramatically when Lufthansa ceased paying for stand-by drivers. Pay records do show a sudden decrease in Mr. Ranger's earnings after May 1994. Consequently, it is not appropriate in the Board's view to use the PAC Period to assess whether Mr. Ranger enjoyed a usual level of earnings that could be converted to a percentage that might in turn be applied against earnings in the Remedy Period.

The Board noted the consistency of Mr. Ranger's earnings in the four-month period following June 1994, (the month in which stand-by pay ended) and of the earnings of the bargaining unit driver group during this time. Consequently, we find that conclusions concerning his usual earnings may be drawn from that period. Noting the gradual and unexplained decline in Mr. Ranger's earnings after those four months, and having regard to his earnings in the months of the Reference Period, the Board concludes that he too experienced income loss because of discriminatory Employer action. The average percentage of his earnings relative to the driver group in the four-month period of July - October 1994 may be calculated in a manner similar to the PAC Percentages. The resulting percentage may then be applied to the months of the Remedy Period and the difference calculated between what Mr. Ranger would have notionally earned in the absence of discrimination and what he actually earned. In making this award, the Board did consider evidence concerning Mr. Ranger's availability in the Remedy Period, and the Employer's explanation for work distribution in November 1995.


Finally, the Board awards interest to each Complainant as part of his income loss. Interest is to be calculated at the date of the Board's order using the "rough and ready" method applied by this Board in Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRB no. 527) at pages 120-123; and 106-109, which decision adopted the reasoning of the Ontario Labour Relations Board in Hallowell House Limited, [1980] OLRB Rep. Jan. 35. In short, to calculate the interest in this case:

divide the amount of lost income awarded in half, and apply the appropriate annual interest rate (for 1995), pro-rated to reflect the length of Remedy Period.

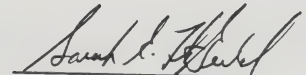
In conclusion, the Board orders the Employer to cease violating section 94(3)(a)(i), and to pay to the Complainants within three weeks of the date of this decision, their loss of income including interest, as calculated pursuant to the formulas set out above. The Board retains jurisdiction to deal with matters arising in connection with this decision, and appoints Mr. Hank Zwirek, Senior Labour Relations Officer, to assist the parties in implementing these awards.



J. Philippe Morneault  
Vice-Chair



Véronique L. Marleau  
Member



Sarah E. FitzGerald  
Member





# information

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## Summary

Paul du Bourg, *employee*, Canadian Pacific Limited, *employer*, and Human Resources Development Canada, *interested party*.

Board File: 950-325  
CLR/CCRT Decision no. 1185  
October 11, 1996

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Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code, Part II.

A machinist, who had suffered injury at a certain work station, was reassigned to the same work on his return, following time off on workers' compensation. He refused to work pursuant to his rights under the Code. The safety officer, following a complete investigation, found that even though there was the potential for cumulative injury in the work, no danger within the meaning of the Code existed. The Board confirmed the decision of the safety officer.

## Résumé

Paul du Bourg, *employé*, Canadien Pacifique Limitée, *employeur*, et Développement des ressources humaines Canada, *partie intéressée*.

Dossier du Conseil: 950-325  
CLR/CCRT Décision n° 1185  
le 11 octobre, 1996

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Renvoi d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail, Partie II.

Un machiniste, qui s'était blessé à un poste de travail, avait été réaffecté au même poste à son retour, après un congé pour accident de travail. Il a refusé de travailler en vertu de son droit prévu dans le Code. À la suite d'une enquête complète, l'agent de sécurité a jugé que, même s'il y avait possibilité que l'employé se blesse à nouveau, il n'y avait aucun danger au sens du Code. Le Conseil confirme la décision de l'agent de sécurité.



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## Reasons for decision

Paul du Bourg,

*employee,*

*and*

Canadian Pacific Limited,

*employer,*

*and*

Human Resources Development Canada,

*interested party.*

Board File: **950-325**

CLRB/CCRT Decision no. **1185**

October 11, 1996

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The Board was composed of Michael Eayrs, sitting as a single Member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on December 15, 1995 at Winnipeg.

### Appearances

Mr. Dennis Cross, President, Local 101, CAW-Canada for the employee, assisted by Mr. Glenn Michaluk, Regional Vice-president, CAW-Canada;

Mr. Glenn Wilson, Counsel, for the employer, assisted by Ms. Adrienne McCullough, Safety/Human Resources Administrator; and

Messrs. Ken Chmeliuk and Ed Francis, Labour Affairs Officers, Safety Officers.

These reasons for decision were written by Michael Eayrs, Member.

## I

The Board's enquiry resulted from the timely referral of a safety officer's decision pursuant to section 129(5) of the Code. Section 129(5) reads as follows:

*"129(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

The request for referral of safety officer Ken Chmeliuk's decision was made by Mr. Paul du Bourg, a machinist employed by Canadian Pacific Railway (CP Rail) at its Weston Shops. The referral was made following a continued refusal to work by Mr. du Bourg and the safety officer's decision that no danger, within the meaning of the Code, existed.

## II

The circumstances giving rise to Mr. du Bourg's refusal to work and the safety officer's decision in question are these.

In 1988, Mr. du Bourg, an experienced machinist, was diagnosed as having carpal tunnel syndrome in both wrists, and following surgery and recuperation, returned to work and performed normal duties. According to his statement, he experienced no further difficulty until late 1994 when assigned to the Flexible Machining System (FMS) at which time he experienced back pain, followed in March 1995, by pain in his arms, shoulders and hands for which he received first aid on several occasions. In early April 1995, Mr. du Bourg experienced more difficulties and sought medical



advice. After a short period of assignment to other duties, Mr. du Bourg was informed by CP Rail on April 21, 1995, that no further "light duties" were available; he was thereafter off work, on Workers' Compensation, until his return to duties, without medical restriction, in August 1995. He was again assigned to the FMS station and, on August 21, 1995, exercised his right of refusal to work and was assigned alternate duties. On the next day, following a proper investigation of the matter, Mr. du Bourg continued his refusal. The safety officer then conducted his investigation and rendered his initial decision of "no danger" followed by a full written decision which reads in part:

*"II. INVESTIGATION BY SAFETY OFFICER:*

*1. Statement of Refusal:*

*"No changes made to work station, after coming from Workmen's Compensation, situation that caused injury has not changed."*

*2. Employee's Description of Events:*

*Mr. du Bourg returned to his duties at the FMS on August 8, 1995. Mr. du Bourg was off for approximately three months prior to his return, during which time he collected Worker's Compensation benefits for an injury he sustained while working on the FMS.*

*On August 21, 1995 at approximately 1630 hours he felt that if he continued to perform his duties he would end up being injured. Mr. du Bourg exercised his right to refuse dangerous work at this time. He was then assigned alternate duties.*

*3. Employer's Description of Events:*

*On April 17, 1995 the employer installed a single magnet connected to a jib crane. This crane and magnet was installed to eliminate the need to physically lift the plates. After a week of using the magnet arrangement Mr. du Bourg complained of sore wrists at which time he attended the first aid station and received treatment in the form of ice packs.*

*On April 21, 1995 the employer informed Mr. du Bourg that because of his condition they suggested that it would be necessary to obtain medical authorization before he could resume duties.*

*On August 8, 1995 Mr. du Bourg returned to work and was assigned to the FMS line. Mr. du Bourg provided a letter from his personal physician indicating that he is fit for full duties.*

*On August 21, 1995 at approximately 1630 hours Mr. du Bourg exercised his right to refuse dangerous work. At this time Mr. du Bourg was assigned alternate duties.*

*On August 22, 1995 at approximately 1600 hours an investigation of Mr. du Bourg's refusal was undertaken. The committee could not come to a resolve and Mr. du Bourg continued his refusal.*

*4. Work Being Accomplished at Time of Work Refusal:*

*Mr. du Bourg was assigned to the Flexible Machining System (FMS). His duties consisted of transferring steel plates from a pallet to a machining table approximately 5-6 feet away. The plate's dimensions were approximately 13"x7"x1" and weighed approximately 57 lbs. The table accommodates five of these plates. Once five plates have been transferred from the pallets to the table they are secured in place with numerous clamps as well as nuts and bolts.*

*Once the plates are secured in place the table is automatically moved through a conveyor system where they are cleaned and milled. Once this process is completed the plates are then removed from the tables and transferred to a pallet (revers [sic] of above procedure). Transferring of these plates can be accomplished by physically lifting them from the pallets and carrying them to the table. A crane and magnet arrangement is available for employees who do not wish to physically lift the plates.*

*4. [sic] Facts established by the Safety Officer:*

*1. A letter from Mr. du Bourg's doctor dated April 24, 1995 indicates that a weight restriction of 25 lbs. would apply to Mr. du Bourg's duties at the FMS loading station 1B.*

*2. A letter from Mr. du Bourg's doctor dated July 10, 1995 indicates that Mr. du Bourg is fit for full duties with no weight restrictions.*

*3. Mr. du Bourg received training in proper lifting procedures and back injury prevention.*

4. *A single magnet on a jib crane was installed at the loading station to assist in the lifting and transferring of the steel plates to the tables.*
5. *We were informed that the plates weighed approximately 57 lbs. (larger plates can weigh up to approximately 65 lbs.)*
6. *Mr. du Bourg stated that his arms and wrists were not sore at the time of our investigation.*

DECISION OF THE SAFETY OFFICER:

*A demonstration of the duties performed at the FMS loading station was conducted by employee Sonny Amposta. During this demonstration the operator transferred the plates by physically lifting and carrying them to the table. He also demonstrated the use of the magnet and crane arrangement to move these plates. These plates were then clamped and bolted down.*

*After viewing this operation it was determined that **NO DANGER** existed within the meaning of danger as specified in section 122(1) of the Canada Labour Code, Part II.*

*The danger must be immediate and real. Mr. du Bourg's concerns relate to the possibility that if he continued to perform this work he may be injured as a result of the repetitive motions of his duties.*

*Mr. du Bourg's refusal to work must be based on the belief that he will be injured right there and then. His refusal was based on the potential for a repetitive strain type injury which means that the danger is not immediate as this type of injury tends to be cumulative.*

*It should be stressed that because my decision finds that there is no immediate danger to Mr. du Bourg, it does not mean that the potential for a cumulative type injury does not exist. During the investigation debriefing the Safety and Health Committee members as well as two present supervisors assured me that they will conduct an investigation into the circumstances of this refusal with the view of assessing the duties of this position and the possibility of providing a more ergonomic clamping system on the FMS table."*

At its hearing, the Board found the safety officer's decision accurately describes the FMS operation which is performed from time to time. The FMS operation at issue in this case was a significantly lengthy one, performed by CP Rail for an outside party and involving the assignment of nine machinists, none of whom (other than Mr. du Bourg) has experienced similar symptoms.

The difficulties associated with the lifting of the slabs from pallets to machining table and the reverse operation following the machining operation had been significantly reduced by the installation of a magnetic lifting device. Thus, the Board's enquiry focused more intently (although not entirely) on the quantity and repetitive nature of the clamping and unclamping of the slabs to and from the machining tables.

The Board notes that the installation of the magnetic lifting device by CP Rail resulted from recommendations of the joint safety and health committee. It also heard that CP Rail had, on a trial basis, as a result of the joint committee's recommendation, attempted the use of an alternate clamping system which it had found unsatisfactory. It had then reverted to the original (clamping) system.

### III

Section 122(1) of the Code defines danger as follows:

*"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;*"

and section 128(2)(b) states:

*"(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where  
...*



*(b) the danger referred to in subsection (1) is inherent in the employee's work or is a normal condition of employment."*

The CAW argued that the repetitive and excessive movements required in the FMS operation, particularly with respect to the clamping and unclamping of the plates were such that injury, resulting from cumulative excessive strain, could occur at any time. Thus, it argued, the safety officer had erred in his finding of "no danger" based, essentially, on the notion that the "danger must be immediate and real" rather than the possibility of future injury.

It argued further that the Board's adoption of the "narrow" notion of immediacy applied to the circumstances of a case such as this, was to effectively "gut" Part II of the Code of any real value. The CAW also argued that work at the FMS station posed more than normal risks and cited Mr. du Bourg's previous injury in support of that proposition. It urged the Board to overturn the decision of the safety officer and order the changes (to the FMS) necessary to alleviate the possibility of future danger. In particular, the CAW urged the Board to order CP Rail to install a new clamping system which would reduce the risk of cumulative strain injury.

CP Rail argued that the safety officer's decision was entirely proper in the circumstances and, citing a number of cases, in keeping with the Board's consistent interpretation of the meaning of danger contemplated by the Code. Those cases all supported the interpretation that danger giving rise to a refusal to work must be immediate and real and not inherent in the work. For a full discussion of this proposition see David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRB no. 686).

CP Rail argued that while the working conditions at the FMS Station were, perhaps, less than ideal, they were not such that danger within the meaning of the Code existed.

IV

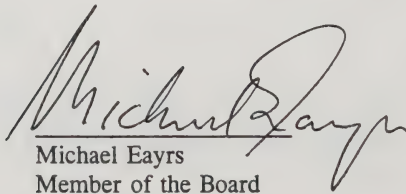
Given Mr. du Bourg's earlier medical diagnosis of carpal tunnel syndrome and later experience on the FMS resulting in a temporary weight restriction (which was lifted prior to his return to work) it is understandable that he felt reasonable cause to believe that work at the FMS Station could be dangerous for him.

The decision of the safety officer, however, was based, following a complete and thorough review of the workplace, on the premise that there was no immediate danger within the meaning of the Code. Based on all the evidence at the hearing, the Board, in all the circumstances of this case, agrees with that premise. Accordingly, the safety officer's decision is confirmed.

V

Having confirmed the safety officer's decision, I do note his remarks with respect to the potential for a cumulative type of injury in the workplace as he found it. I also note his reference to the assurances of the safety and health committee members together with CP Rail officials that they would further investigate possible improvements to the FMS.

Although, having confirmed the officer's decision, I have no authority to issue any order to this effect, I urge the parties (if they have not already done so) to jointly explore and implement further improvement(s) to the FMS.

  
Michael Eayrs  
Member of the Board

# information

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## Summary

Syndicat des agents de maîtrise de Québec-Téléphone, *applicant*, et Québec-Téléphone, *employer*.

Board File: 555-3924  
CCRT/CLRB Decision no. 1186  
October 24, 1996

Certification application (section 24 of the Canada Labour Code, Part I). Dispute regarding appropriateness of bargaining unit and inclusion of positions claimed to be managerial and confidential.

The Syndicat des agents de maîtrise de Québec-Téléphone, a provincially certified union, is seeking bargaining agent status to represent those employees of Québec-Téléphone already covered by its certification as well as first and second level "managers".

Québec-Téléphone is a telecommunications company and, as such, comes under federal jurisdiction as per the Supreme Court of Canada judgment in Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), [1994] 1 S.C.R. 878.

## Résumé

Syndicat des agents de maîtrise de Québec-Téléphone, *requérant*, et Québec-Téléphone, *employeur*.

Dossier du Conseil: 555-3924  
CCRT/CLRB Décision n° 1186  
le 24 octobre 1996

Demande d'accréditation (article 24 du Code canadien du travail, Partie I). Différend portant sur l'habileté à négocier de l'unité et sur l'inclusion de postes comportant présumément des fonctions de direction et des fonctions confidentielles.

Le Syndicat des agents de maîtrise de Québec-Téléphone, détenteur d'une accréditation provinciale, cherche à obtenir le statut d'agent négociateur pour représenter les employés de Québec-Téléphone déjà visés par son accréditation ainsi que les «gestionnaires» de premier et deuxième niveau.

Québec-Téléphone est une entreprise de télécommunications qui, à ce titre, relève de la compétence fédérale conformément à l'arrêt de la Cour suprême Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), [1994] 1 R.C.S. 878.



The Board distinguished between first and second level "managers". Although first level "managers" perform an important role in carrying out the company's activities and have relative operational autonomy, their role is not that of a manager. Their discretion in decision making is effected within set parameters. Given the community of interest shared with the project officers (agents de maîtrise), they are included in the bargaining unit.

The responsibilities of second level managers in areas such as planning, organizing, directing and control involve real decision making authority. As managers, they are excluded from the unit.

As for the positions whose confidential functions are in dispute, the Board determined their inclusion or exclusion on the basis of the role played by the incumbents in labour relations as well as the regularity and continuity of their involvement.

The Board, satisfied as to the union's majority support, issued a certification order.

Le Conseil distingue les «gestionnaires» du premier niveau de ceux de deuxième niveau. Même si les «gestionnaires» de premier niveau jouent un rôle important dans la poursuite des activités de l'entreprise et jouissent d'une autonomie relative au niveau de l'exploitation, leur rôle n'en est pas un de gestionnaire. Leur pouvoir discrétionnaire dans la prise de décision s'exerce à l'intérieur d'un cadre déterminé. Parce qu'ils ont une communauté d'intérêt avec les agents de maîtrise, ils font partie de l'unité de négociation.

Les responsabilités des gestionnaires du second niveau en matière, notamment, de planification, d'organisation, de direction et de contrôle donnent à ces derniers une véritable autorité dans la prise de décision. En tant que gestionnaires, ils sont exclus de l'unité.

Quant aux postes en litige comportant des fonctions confidentielles, la décision du Conseil d'inclure ou d'exclure leurs titulaires s'appuie sur le rôle qu'ils jouent en matière de relations de travail de même que sur le caractère régulier et continu de ce rôle.

Le Conseil, convaincu que le syndicat jouit d'un appui majoritaire, rend une ordonnance d'accréditation.

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## Reasons for decision

Syndicat des agents de maîtrise de Québec-  
Téléphone,

*applicant,*

*and*

Québec-Téléphone,

*employer.*

Board File: 555-3924

CCRT/CLRB Decision no. 1186

October 24, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Mr. François Bastien and Ms. Roza Aronovitch, Members. Hearings with respect to this file were held in Rimouski, Quebec.

### Appearances

Mr. Serge Morin, union representative, assisted by Ms. Madeleine Hudon, union president, and Mr. Gilles Dumais, union advisor, for the applicant;

Mr. Jean-François Dolbec, counsel for the employer, assisted by Mr. Gilles Lavoie, Director, Human Resources, Québec-Téléphone, for the employer.

These reasons for decision were prepared by Ms. Suzanne Handman, Vice-Chair, and Mr. François Bastien, Member.

These reasons deal with issues related to the determination of an appropriate bargaining unit subsequent to a certification application filed with the Board by the

Syndicat des agents de maîtrise de Québec-Téléphone (the "union") on June 23, 1995, and amended on July 18, 1995. Through this application, the union (CUPE) seeks to represent the project officers at Québec-Téléphone (the "employer") together with first and second-level managers. The union's view is that the incumbents of these positions share a community of interest, and accordingly should be included in the same bargaining unit.

This application is in the wake of the Supreme Court of Canada judgment of April 26, 1994 regarding the constitutional jurisdiction of the Parliament of Canada over local telephone services. In this judgment, the Supreme Court ruled that the labour relations of a local telephone company delivering interprovincial and international telecommunication services to its subscribers is within the federal jurisdiction of Parliament (Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), [1994] 1 S.C.R. 878).

In the present case, Québec-Téléphone offers its clients, located in the province of Quebec, telecommunication services which extend beyond the province's borders through the use of network interconnections between Québec-Téléphone and Bell Canada. The range of products and services offered - which includes not only local and long distance telephone services but also computer communications services such as Internet access - allows its subscribers to communicate nationally and internationally. It follows that as per Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications), *supra*, Québec-Téléphone comes under federal jurisdiction (see Télébec Ltée (1995), 99 di 1 (CLRB no. 1133)).

## II

The applicant union was certified by Quebec's Office of the Labour Commissioner-General on April 14, 1980, and the certification order was amended on September 14, 1981 in respect of a unit described as follows:

*"All employees within the meaning of the Labour Code who hold positions classified by the employer in salary groups 1 to 5 inclusively, with the exception of persons who occupy the following positions:*

- Chief, Graphic and Advertising Communications;*
- Analyst, Career Planning and Training Evaluation;*
- Analyst, Human Resource Planning and Staffing;*
- Analyst, Job Evaluation and Compensation;*
- Analyst, Benefits and Employee Records;*
- Assistant, Job Specification and Post-training Evaluation;*
- Assistant, Career Planning;*
- Assistant, Pension Plan;*
- Assistant, Employee Records;*
- Assistant, Internal Auditors;*
- Assistant, Safety;*
- Internal Auditor;*
- Officer, Labour Relations;*
- Assistant, Security;*
- Officer, Safety;*
- Officer, Staffing;*
- Security Co-ordinator;*
- Instructor Examiner. "*

(translation)

Through this application, the union seeks to represent the project officers included in the provincially certified unit as well as first and second-level managers. Were such a unit to be certified, it would add to the four existing units: maintenance staff, office employees, technicians and telephone operators. On November 28, 1994, certification orders were issued by the Board for each of these four units to the Syndicat des employés d'exécution de Québec-Téléphone, CUPE, Local 5044.

Québec-Téléphone challenges the bargaining unit proposed by the applicant in its amended application. It considers as appropriate only that unit which comprises the project officers, namely the unit already certified provincially. It submits that if the Board decides that first and second-level managers are employees within the meaning of the Code, they must form separate bargaining units due to a lack of a community of interest and the possibility of a conflict of interest with the members of the unit

sought. The employer not only opposes the inclusion of managers within the unit sought, but also opposes the inclusion of those positions designated as special assignments and those whose incumbents are deemed to be employed in a confidential capacity in matters relating to industrial relations. Lastly, the employer argues that the inclusion of these managers would result in Québec-Téléphone being over-unionized given the minimum number of executives required to manage the business properly.

The Board's normal practice is not to hold public hearings on issues pertaining to the determination of appropriate bargaining units, or with respect to the exclusion from such units of persons who hold managerial or confidential positions. Because they generally involve matters of fact, the Board's policy is to deal with them, and rule on them, on the basis of the parties' written submissions and the Board officer's report (see Alberta Wheat Pool (1991), 86 di 172 (CLRB no. 907)).

In the present case, the Board decided that issues such as the definition of employee under the federal Code and how it should apply in this case, the scope of the managers' responsibilities, and the complex interaction between project officers and managers warranted that the parties be heard at a public hearing. Thus, on December 21, 1995, the Board issued a hearing notice to the parties in which it indicated that it wished to hear them on the following matters:

*"(a) the nature of the community of interest, if any, between the project officers and the first and second-level managers, namely in the area of career paths, staff transfers, qualifications, etc.;*

*(b) the difference, if any, between the first and second-level managers in terms of the aspects raised by the first question and the nature of the responsibilities exercised by them;*

*(c) the nature and scope of the special assignments and their relationship, if any, with the first and second-level managers;*

*(d) the overall operational framework within which the incumbents of the disputed confidential positions exercise their responsibilities with regard to labour relations; in other words, an overview of the*



*roles of the regions, personnel or human resources officers and how they relate to one another."*

(translation)

### III

The Board convened a hearing with respect to the issues raised by this application, and that the Board is asked to determine. The issues are two-fold. The first one relates to whether the first and second-level managers, in light of their respective functions, are employees within the meaning of the Code and, if so, whether they share a sufficient community of interest with the project officers to justify being placed in the same unit. A specific aspect of the same question concerns special assignments, for the level of the management functions associated with them are at issue. The second issue pertains to the inclusion or exclusion of a certain number of positions which, in the employer's view, should be excluded from the unit because they entail confidential functions within the meaning of the Code.

It should first be noted that the parties agreed, at the conclusion of the hearing, to exclude the following positions from the unit:

- Lawyer (articling)
- Section Head, Staffing
- Section Head, Security/Claims

Accordingly, in addition to the first and second-level managers, the positions still in dispute at the time of the hearing were the following:

Change Leader (Second Level)  
Project Leader (Second Level)  
Supervisor, Recruitment (previously Officer, Recruitment)  
Analyst, Human Resources Planning  
Advisor, Career Planning

Advisor, Occupational Safety (position abolished - combined with Health Counsellor)\*  
Analyst, Occupational Security  
Analyst, Benefits and Employee Files  
Analyst, Systems and Methods  
Analyst, Employee Evaluation and Pay  
Assistant, Benefits  
Internal Auditor  
Internal Auditor, Informatics  
Assistant, Employee Records  
Special Career Assignment  
Advisor, Organization and Functions

#### IV

Section 3(1) of the Canada Labour Code defines "employee" as follows:

*"'employee' means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."*

There is abundant case law regarding the criteria used by the Board in deciding to exclude certain positions from a bargaining unit by reason of their incumbents not being employees within the meaning of section 3 of the Code, either because they perform management functions or are employed in a confidential capacity in matters relating to industrial relations. Furthermore, the parties' representatives extensively cited the same decisions in support of their respective positions on these issues, in particular British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98); British Columbia Telephone Company (1979), 38 di 145 (CLRB no. 221); Vancouver Wharves Ltd. (1974), 5 di 30; [1975] 1 Can LRBR 162; and 74 CLLC 16,118 (CLRB no. 19); and Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811). This last case represents the Board's most recent update on this question. Lastly, in Canadian Broadcasting Corporation, October 29, 1993 (LD 1226), the Board summarized

succinctly the whole set of factors and criteria which justify the exclusion of certain positions from a bargaining unit because their incumbents are not employees within the meaning of the Code. These are as follows:

*"a) management exclusion is determined fundamentally on the basis of an individual's effective and regular exercise of decision-making. Or, in other words, what matters is the power to decide, not the power to recommend. See British Columbia Telephone Company (58), supra;*

*b) the functions over which the power to decide exercises itself are typically those of the management cycle, i.e. planning, organising, staffing, co-ordinating, directing and controlling (Vancouver Wharves Ltd. (1974), 5 di 30; [1975] 1 Can LRBR 162; and 74 CLLC 16,118 (CLRB no. 19);*

*c) the extent, not merely the existence, of authority in financial matters is a key indicator of a position's management content (See Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240);*

*d) management is a highly dynamic, not static, concept, and 'its precise ambit is a question of fact or opinion for the Board rather than a question of law' as stated by the Federal Court of Appeal in Bank of Nova Scotia v. Canada Labour Relations Board, [1978] 2 F.C. 807, at page 813; (1978), 21 N.R. 1, at page 7; CLLC 14,145, at page 128. Island Telephone Company Limited (1990), 81 di 126 (CLRB no. 811), spoke of the concept as 'the embodiment of ever-changing corporate structures and processes, work practices, technologies and, ultimately, social values' (page 129);*

*e) determination of management status will rest in the end on the consideration of all factors taken together and on how the specific duties of a position relate to the decision-making framework in place and on the organisational configuration of which it is a part (Island Telephone Company Limited, supra, page 131."*

(page 7)

One aspect of the last criterion relates to the need for the Board to take into account the overall bargaining unit structure of the undertaking, and its impact on the company's ability to run its business, when applying these principles to the

circumstances of the present case. In Télébec Ltée, supra, the Board explained itself as follows:

*"When an appropriate unit exists, employees can exercise their rights under the Code and businesses can operate smoothly. In other words, the community of interest that constitutes the basis on which rests employee rights must also take into account the structural, administrative and operational reality of the business. (Canada Post Corporation, supra, pages 90-91; and 151-154; and Canadian Museum of Civilization (1992), 87 di 185; and 92 CLLC 16,045 (CLRB no. 928), pages 197; and 14,359)."*

(page 14)

The Board's task in the present case is therefore to review the substantial body of written and oral evidence, and to situate the specific organizational and operational context in which the functions of the incumbents of the disputed positions, and their specific contribution to the overall management of the business, are carried out. This involves first the presentation of a brief overview of the business and, next, an examination of the scope of the functions and authorities devolved to the first and second-level managers in order to determine their actual management content within the meaning of the jurisprudence referred to earlier.

## V

Québec-Téléphone, a telecommunications business, services a very large territory which takes in Quebec City and its surroundings within about a 100-km radius, the Gaspé peninsula and the North Shore. It serves approximately 550,000 persons in those areas. Québec-Téléphone's head office is in Rimouski, and it has some 1,700 employees.

The company operates in an industry marked by increasing competition and rapid technological innovation. Its activities are not confined to local and long distance telephone service but extend to services such as mobile services, installation,



maintenance, and sales and the rental of subscribers' equipment, as well as Internet access.

Over the years, there have been many major changes in the company's hierarchical structure. Between 1980 and 1989, the company eliminated two levels of line authority between vice-presidents and first-level managers. These resulted in a flattening of the hierarchical pyramid and an increase in the control span of managers vis-à-vis employees. The last major reorganization was implemented in 1995 in order to further decentralize management's authority.

The management structure currently includes the chief executive officer, five vice-presidents, 18 division managers (third-level managers), 62 area managers (second-level managers), and 87 section chiefs (first-level managers). The positions of the first two hierarchical levels are those in dispute and the ones which will now be examined.

The Board had ample documentary evidence concerning these positions, already on file, at the time of the hearings. Many documents were filed during the hearing, adding to this body of evidence. There was also a great deal of oral evidence. This evidence, based on a sampling of positions, was sufficiently large to provide a good overview of the diversity of the functions in dispute as well as their distribution throughout the enterprise.

Our analysis of the evidence will not be done on a case-by-case basis but will focus instead on whether the core management functions submitted to the Board as typical of the positions of the first and second-level managers are such that they warrant exclusion from the definition of "employee" under section 3 of the Code. To that end, we will identify the salient traits of the disputed positions, particularly with respect to any important differences between first and second-level managers.

### First-level managers and project officers

The first-level managers are section heads. They work in a service outlet in Rimouski or in a remote region within Québec-Téléphone's territory. All but about ten of first-level managers, including Gérald Smith, the supervisor of the Havre-Saint-Pierre network, work in the same geographical location as their immediate superiors. These supervisors are responsible for an operational unit and report to a second-level manager. On occasion, some of them are asked to supervise project officers. This situation did not present itself until the early 1990s and, as we previously indicated, involves very few first-level managers.

While first-level managers have significant responsibilities vis-à-vis the planning and day-to-day, or at least regular, performance of the tasks carried out by the staff they supervise, they generally, and on the whole, do so within a rather well-determined framework as regards their actual decision-making authority in matters of financial commitments, hiring and staff evaluation, disciplinary measures and representational functions. For instance, the evidence showed that decisions to create or even abolish positions are made by third-level managers even though managers at lower levels obviously participate in the decision-making process. All the typical activities of first-level managers pertaining to their decision-making authority are subject to very detailed internal policies which strictly limit their range of discretion. In fact, this range so closely resembles that of the first-level managers in Island Telephone Company Limited, *supra*, pages 134-137, that a detailed review of the number or scope of these activities seems, in our view, superfluous.

The supervisors who testified spoke of the large degree of autonomy they enjoyed in running their services and the lack of frequent or significant intervention on the part of their immediate superiors, the second-level managers. However, the evidence reveals that this feeling has more to do with the great familiarity most of them have of the operations or services they direct than with the actual exercise of true

discretionary authority which is typical of the management functions recognized by the case law.

The interaction between analysts and first-level managers was described by the Operations Centre Director, Mr. Julien Godin, who as a second-level manager directs supervisors and, occasionally through them, the analysts. In his testimony, he emphasized the need for these supervisors to have contact with other groups in the company on matters related to strategic and routine planning. He said, "They deal with marketing, with sales and also with all aspects of billing" (transcription of February 23, 1996, translation, page 427). When Mr. Godin spoke of the interaction of the analysts with staff from marketing, planning and engineering on the introduction of a new service such as the digitalization of equipment (ISDN), he indicated it is incumbent on the analysts to make sure the equipment comes in on schedule, and that this "service is truly operational, that is, from a technical point of view, how things should be done, how the new service should be programmed in the automatic switches" (transcription of February 23, 1996, translation, page 428).

### Second-level managers

The second-level managers have various titles, such as area manager, project leader, change leader, area director and regional director. In short, they are responsible under these various titles for an area of activity on a large part of the company's territory. They exercise direct or indirect supervision over a large portion of the company's employees. Their responsibilities for planning and organizing the company's areas of activity, selecting and evaluating their staff, and financially committing the company are clearly - from the perspective of both content and relations to the company's essential functions - at a higher level than those of their first-level colleagues.

While second-level managers are subject to the same formal requirements to have their decisions approved by third-level managers when the creation or abolition of positions is involved, their effective authority to make decisions on such matters is obviously

greater than that of the first-level managers. The testimony of at least two of them - Mr. Dagnault, Project Leader, New Invoicing System, designated by its English acronym CBSS, and Monique Marois, Invoicing Area Director - illustrates both the nature and practical scope of their decisions in this area. The examples they provided mark the extent to which their authority to manage differs significantly from that of the supervisors.

Mr. Dagnault, Project Leader, New Invoicing System (CBSS), explained that, due to the project's very nature, its long duration and its ever-changing personnel requirements, various teams (for which he himself had to negotiate secondments) were grafted onto a small initial core of employees at various phases of the project. The actual, if not formal, authority vested in him by management in respect of these budgetary and personnel matters came out loud and clear throughout his testimony.

As regards Mrs. Marois, her responsibilities in the restructuring and staffing of all the invoicing positions required by the new system inherited from Mr. Dagnault led her to decide to eliminate certain positions that had become obsolete, and to reassign the employees affected. In concert with the company's Industrial Relations Assistant Director, she oversaw the smooth running of this process, and she discussed reassignment issues with the union concerned (Syndicat des employés d'exécution de Québec-Téléphone, CUPE, Local 5044). In short, her involvement and participation in the resolution of all these matters were substantial, and her decisions had a genuine impact on the persons affected.

As for other aspects of the functions performed by the second-level managers and the scope of their managerial authority, the invoicing project whose design and implementation had been assigned to Gaston Dagnault is worth examining and analysing. This project, called CBSS, was meant to design and implement a new invoicing software at Québec-Téléphone. It was implemented over a period of more than three years, from September 1992 to May 1996. Management had mandated Mr. Dagnault to lead the entire project through to completion. In this capacity, his



essential functions involved the negotiation of a contract to purchase software from a U.S. firm, the numerous alterations of the project's parameters as it was being implemented, the assignments of personnel to the project, the ongoing interaction with the company's senior executives on the one hand, and with outside firms from which services and specific expertise were sought.

Throughout his testimony, Mr. Dagnault referred to his role as that of "macro-managing" (translation) the project, that is, determining the major phases such as objectives and deadlines, building a team to implement the project and, above all, maintaining relations with senior management to ensure full integration with company operations once the new system was implemented. The scope and level of these functions stand out when we consider that the project's initial total budget was some \$7 million which had grown to almost \$10 million by the time the project was completed. These circumstances prompted this project leader to deal regularly with the company's senior executives with respect to choices and decisions to be made.

Of course, not all the second-level positions shared the same functions performed by Mr. Dagnault in his position as project leader. Individual positions are unique in terms of the area concerned, the relative complexity of the project or functions involved as well as the specific organizational context in which they are carried out. That being said, at the time the application was filed, the company had five project leaders, all at the second level, whose functions were similar to those performed by Mr. Dagnault and, as seen earlier, Ms. Marois. This observation also applies to the position of Operations Centre Director, held by Mr. Godin, and to that of Area Director, Engineering and Outside Networks, held by Rosaire Simoneau.

Throughout his testimony, Mr. Godin conveyed a very practical sense of his responsibilities and their level of complexity. They consisted first and foremost in ensuring the "functionality and consistency" (translation) of the sections under his authority. As well, they involved maintaining an ongoing relationship with the other divisions within the company, consistent with his role to determine the orientation of

the operations centre in relation to the new services to be offered. That is how he explained the need to continually reorganize the sections in the context of changing products and markets. In short, all such functions of planning, organizing, directing and controlling were not much different in their outcome, operational level or business process than those of Ms. Marois and Mr. Dagnault.

The same general impression emerged from Mr. Simoneau's testimony. All the management functions, to varying degrees, are found in his responsibilities for planning the network in relation to the changing needs of Québec-Téléphone's customers. When he described his functions, he often spoke of work "relating to organizational changes, changes in attitude and culture, empowerment". He indicated how this work translated itself in the selection of the staff required, in the financial resources to secure, in short, in many facets of management.

From this standpoint, it is interesting to note Mr. Simoneau's remarks concerning his hiring authority, which he said generally applied to temporary staff driven as it often was by the need to "operate on a temporary basis" (translation) in the absence of precise information as to future needs. Staff evaluation was somewhat similar, in that what he actually did seemed to clearly reflect more discretionary flexibility than would be assumed from internal policy documents on the subject.

To the extent that Mr. Simoneau's functions are broadly similar to those of his second-level colleagues who work in areas more closely connected with the company's operational activities, there is every reason to conclude that, notwithstanding a more stable decision-making framework for the work of these second-level managers compared to project leaders, the essential aspects of the functions they perform are similar.

Lastly, on the issue of the interaction between supervisors and analysts or professionals who work in his unit and whom he is responsible for supervising, Mr. Simoneau said that he calls on the expertise of the project officers either to

collaborate with other sections in identifying network needs, or to evaluate the resulting infrastructure requirements once these needs have been determined. This means that there are co-ordination functions which are shared between the analysts and the supervisors but which entail different requirements and perspectives. The analysts' contribution is based first and foremost on their technical expertise, while that of the supervisors pertains to operational requirements.

## VI. ANALYSIS

### Supervisors or first-level managers

What can be concluded from the foregoing examination of the evidence with regard to the questions to be decided by the Board? First, that the supervisors or first-level managers are employees within the meaning of the Code. While their functions, as described in the documentary and oral evidence, are performed in a spirit of openness and with relative operational autonomy, they do not constitute management functions within the meaning of the case law. As we have noted, they are not different in their essential aspects from those described in detail by the Board in Island Telephone Company Limited, *supra*. Whatever decision-making discretion they enjoy - and they do - it is always exercised within a predetermined framework, either through detailed administrative management policies or through essential operational requirements whereby the supervisor must ensure continuity of service. These cases strictly involve an autonomy of means, with these means, for the most part, being clearly defined at the outset.

Indeed, if first-level managers enjoy a certain margin of autonomy, it is one that stems largely, on the one hand, from the relative ease with which their human resources and financial needs can be predicted and, on the other, from the requirement placed on them to do whatever is necessary to maintain or, in the event of major outages, restore telephone services. The testimony of the supervisors - including Gérald Smith,

who directs the company's services on the Lower North Shore from Havre-Saint-Pierre - shows that the authorization to exceed normal spending limits on overtime, for example, stems from immediate operational requirements more than from the exercise of any particular financial authority they might enjoy. In short, the supervisors play a major role in Québec-Téléphone's activities but this role is not a managerial one within the meaning of the Code.

There is, however, one exception to the latter statement: the supervisor of the Havre-Saint-Pierre network, Gérald Smith. The great distance between him and his supervisor, who lives in Sept-Îles, his role of representing the company in this remote region, his authority and his decisions regarding the hiring of staff, as well as the scope of his functions at the regional level, are reasons that justify the exclusion of his position from the proposed unit. This situation brings to mind that referred to by the Board in British Columbia Telephone Company, *supra*, pages 377-378. Conversely, the situation of the other supervisors - whose immediate superiors work at a different location - is different from that of Mr. Smith, if only because of the relative proximity of the superior, and of a higher level of general supervision resulting from the greater variety and volume of the company's activities in this part of the territory. This concludes our discussion of the supervisors' management functions.

The question of the community of interest shared by the supervisors and the project officers remains to be determined. An initial aspect of this question pertains to the very nature of the functions of both positions. It should be noted that the incumbents of these two types of positions, as indicated above, enjoy real operational discretion even though it is not managerial in nature.

In effect, this autonomy and the range of action associated with it stem primarily, as we saw earlier, from the incumbents' thorough knowledge of the equipment in question, the technical characteristics of a product or process, or the operation or functioning of this equipment or process. There are, of course, significant differences



between these two groups in terms of how this knowledge is applied. For example, the project officers' knowledge pertains more to technical concepts and their implementation, whereas the supervisors' knowledge primarily involves the practical and daily operation of the equipment or processes for which they are responsible in conjunction with the employees they supervise. Both positions, however, undeniably involve functions of supervision and co-ordination even though they vary in degree and in method.

In this regard, it is interesting to note how their respective roles manifest themselves vis-à-vis their interaction with other areas of the business. For example, the first-level managers or supervisors must ensure the continual operation of a service, piece of equipment or set of equipment. For this reason, they, like the analysts, are often called on to deal with other units or areas of the business but these dealings pertain to the practical operation of their service or equipment. Their involvement occurs on a daily basis and focuses on activities associated with the delivery of a service for which they are responsible.

In any event, the primary objective of both the supervisors and the analysts in performing their functions remains the operational coherence and functional consistency of the teams and equipment. Naturally, a major portion of the supervisors' work relates to their own team members, but this is always from the standpoint of ensuring the functioning of an operation or process, whereas the analysts' contribution to functional consistency is of a more technical nature. The co-ordination actually performed by both positions - a function which more specifically defines the specificity of their role within the business - identifies them as a group within the overall context of the company's functions and processes.

The career profile of the project officers and the supervisors also suggests some commonality between the two groups. Yvan Beaulieu, Human Resources Administrator and Director, advised the Board that, of the 87 persons who are first-level managers, 47 originated from the group of employees who were represented by

the Syndicat des employés d'exécution de Québec-Téléphone, CUPE, Local 5044, and 40 from the professional or project officers group. It should be noted that the origin of an employee refers to the position from which the incumbent moved directly from one group to the other. This information is more relevant than the entry-level position or first-management position, concerning which statistics were also provided at the hearing.

As regards other aspects of the community of interest - for example, the type or method of compensation for analysts and supervisors - any differences that exist are not significant. An examination of all these elements leads us to conclude that the supervisors share a sufficient community of interest with the project officers which justifies their inclusion in the unit.

#### Second-level managers

The first question to be determined in the case of second-level managers is whether or not they are employees within the meaning of the Code. To that end, we must extend the traits identified through our analysis of the oral evidence to the entire group in question although this evidence concerned only a few positions. The job descriptions of the second-level managers who did not testify make it possible to transpose *mutatis mutandis* the results of the aforementioned analysis to their situation. The results of this analysis are as follows.

The above analysis of the functions of second-level managers showed that the responsibilities assigned to these managers, including the project managers, are significant and involve, unquestionably, management content. As noted earlier, their planning, organizing, directing and evaluating functions are performed at a level and in connection with projects or business processes which involve the company's actual decision-making authority and, by way of consequence, its policy and methods. For this reason, they enjoy a significant measure of discretion. This discretion refers not only to proven technical knowledge, as in the case of the analysts and supervisors, but

also to a great extent to their knowledge and use of management processes through regular contacts with the highest levels of the organization.

The difference between second-level managers and supervisors is more clearly seen in the nature of the relationship each maintains with other areas of the organization. Second-level managers, like the analysts or supervisors, maintain contact with these areas but they do so primarily to ensure harmony and co-ordination with the hierarchical functions of management or consistency in the decision-making process for the business as a whole, as Mr. Dagnault's testimony clearly showed. In this way, their involvement differs from that of the analysts or supervisors, which, as we saw earlier, relates primarily to co-ordinating the technical aspects of a project, or to their need to ultimately ensure the functional consistency of the system or the new equipment in question.

It should be noted, moreover, that the functions of second-level managers have been performed in recent years in an organizational context dominated by many changes in management processes and structures, including a progressive flattening of the hierarchical pyramid. For example, the elimination of two management levels during the 1980s undoubtedly led to a redistribution of management functions relative to the remaining levels, and to a proportional increase in the management content of the second-level managers. This spells a need for them to deal more with the higher echelons of the decision-making hierarchy in order to decide issues pertaining to the company's management process. It will be recalled that, based on our previous analysis, major differences were noted between supervisors and second-level managers on how they interact and relate to senior management. In the first instance, the relationship centres most often on the operation of the company's equipment and daily operations, whereas in the second, it focuses on changes in the company and its management processes.

The testimony heard from the incumbents of these positions on these aspects of their functions, and their impact on the business, surely justifies drawing such a conclusion.

As described to us, their activities in the areas of planning, organizing, directing and controlling, reflect an undeniable management content both in terms of the level at which they are performed and the decision-making authority they entail. In short, the functions of the second-level managers are sufficiently extensive and continuous, in relation to both the nature of the issues to which they pertain and the hierarchical level at which they are performed, to exclude them from the definition of employee within the meaning of the Code. As we saw, these functions involve the exercise of a significant and ongoing discretion with respect to selecting staff, orienting management processes and setting budgets. Consequently, second-level managers, including the project and change leaders at the same level, are excluded from the unit proposed by the applicant.

#### Exclusions for reasons of confidentiality

Few of the disputed positions fall under this category. As we indicated earlier, the confidentiality at issue here refers primarily to the notion of conflict of interest with respect to labour relations and not to information of a sensitive or personal nature which in any business is subject to the normal requirements of protection and discretion for those who have access to it. In this context, the role played by the incumbents of the positions in question in managing the company's labour relations need to be clarified in order to evaluate the extent to which they are performed on a regular and continuous basis.

The number of persons assigned to the management of labour relations in relation to the size of the business is one factor which can be used to evaluate the scope and frequency of the duties of the incumbents of the disputed positions. For example, when the role exercised by first-level managers in hiring decisions, taking disciplinary measures or administering the grievance procedure is largely confined to providing information, or to being consulted on the matter, that of personnel staff will necessarily be more substantial and its scope broader with regard to the concept of confidentiality as defined by the Code.



Similarly, how this confidential information is used in the context of labour relations relates more directly to a possible conflict of interest than does the matter of who has access to it. In the present case, the question is whether the functions of the personnel staff in question are such that they are in fact managing a substantial portion of relevant labour relations matters, and whether they have access in doing so or use confidential information which might put them in a conflict-of-interest situation. In reviewing the issue of confidentiality, the Board took into account all these factors and their relative weight with respect to the labour relations responsibilities of the positions at issue.

Following this review, the Board first concluded that the incumbents of the following positions do in fact perform confidential functions in matters relating to industrial relations:

- Recruitment Officer
- Health Counsellor
- Analyst, Benefits and Employee Files
- Analyst, Employee Evaluation and Pay
- Internal Auditor
- Special Career Assignment
- Analyst, Occupational Security

However, the Board does not consider that the incumbents of the following positions perform confidential functions within the meaning of the Code. These positions are thus included in the unit:

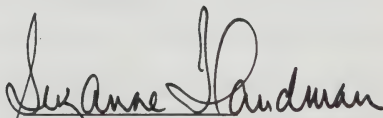
- Analyst, Human Resources Planning
- Analyst, Systems and Methods
- Internal Auditor, Informatics
- Assistant, Employee Records
- Advisor, Organization and Functions
- Advisor, Placement
- Assistant, Benefits

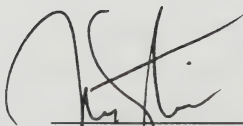
The latter determination disposes of all the issues before the Board in respect of the request for certification.

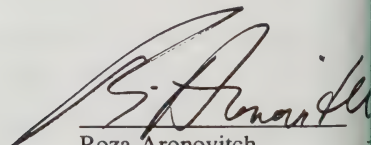
In conclusion, the Board finds that a unit comprised of project officers and supervisors is an appropriate one for collective bargaining. Moreover, the Board is satisfied that, as of the date on which the application was filed, the majority of the employees in the unit wished to have the applicant union as their bargaining agent. The Board will issue an order accordingly certifying the applicant for the following unit:

*"all project officers and supervisors of Québec-Téléphone, excluding all positions above the rank of supervisor, those covered by other certification orders, as well as the following positions: Havre-Saint-Pierre network supervisor, articling student, section head - staffing, section head - security/claims, recruitment officer, health counsellor, analyst - benefits and employee files, analyst - employee evaluation and pay, internal auditor, special assignment professional, and analyst - occupational security"*

This is a unanimous decision of the Board.

  
Suzanne Handman  
Vice-Chair

  
François Bastien  
Member

  
Roza Aronovitch  
Member

# Information

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## Summary

Atlantic Communication & Technical Workers' Union, *applicant* and Maritime Telegraph and Telephone Company, Limited, *employer*.

Board File: 555-3550  
CLRB/CCRT Decision no. 1187  
November 20, 1996

The Atlantic Communication and Technical Workers' Union filed a certification application pursuant to section 24 of the Code seeking to represent a unit of craft employees at Maritime Telegraph and Telephone Company, Limited.

At issue in this application are three disputed positions. The union claims that the incumbents of the disputed positions are doing the same type of work as employees included in the bargaining unit.

When a certification is sought because of a jurisdictional change and the parties have been in a long-term bargaining relationship, the Board will, in most cases, certify a bargaining unit that is similar to the provincial unit or one covered by the scope of the collective agreement. The Board will not allow a trade union to take advantage of a jurisdictional change to sweep in positions that were not previously included and it will not allow an employer to exclude positions that were previously in the unit.

## Résumé

Syndicat des travailleurs en communication et des techniciens de l'Atlantique, *requérant*, et Maritime Telegraph and Telephone Company, Limited, *employeur*.

Dossier du Conseil: 555-3550  
CLRB/CCRT Décision n° 1187  
le 20 novembre 1996

Le Syndicat des travailleurs en communication et des techniciens de l'Atlantique a présenté, conformément à l'article 24 du Code, une demande d'accréditation afin de devenir l'agent négociateur d'une unité d'employés d'atelier de la Maritime Telegraph and Telephone Company, Limited.

Trois postes visés par la demande font l'objet d'un litige. Le syndicat affirme que les titulaires des postes litigieux effectuent le même genre de travail que les employés appartenant à l'unité de négociation.

Lorsqu'une demande d'accréditation découle du changement de la compétence à laquelle est assujettie une entreprise et que les parties en cause entretiennent une relation de négociation collective de longue date, le Conseil, dans la plupart des cas, accrédite une unité de négociation similaire à l'unité provinciale ou une unité comprenant les employés visés par la convention collective. Le Conseil ne permet pas à un syndicat de tirer parti du changement de compétence pour inclure à l'unité de négociation des postes qui ne l'étaient pas auparavant et il ne permet pas non plus à l'employeur d'exclure de l'unité de

However, the Board will not hesitate to include employees whose work functions are similar or identical to those in the existing bargaining unit.

After hearing the parties' arguments and examining in detail the parties' submissions, the Board concluded that the positions sought are not the same as those covered by the scope of the collective agreement.

négociation des postes qui y étaient auparavant inclus.

Toutefois, le Conseil n'hésitera pas à inclure à l'unité de négociation des postes dont les titulaires assument des fonctions similaires ou identiques à celles des employés appartenant à l'unité de négociation.

Après avoir entendu les arguments des parties et avoir étudié en détail leurs observations, le Conseil en vient à la conclusion que les postes en cause ne sont pas les mêmes que ceux visés par la convention collective.

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## Reasons for decision

Atlantic Communication & Technical Workers'  
Union,

*applicant,*

*and*

Maritime Telegraph and Telephone Company  
Limited,

*employer,*

*and*

*various intervenors.*

Board File: 555-3550  
CLRB/CCRT Decision no. 1187  
November 20, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Messrs. Calvin B. Davis and François Bastien, Members.

### Appearances

Mr. Ronald Pink, counsel, for the applicant, also present Ms. Leanne MacMillan; Mr. Gregory North, Q.C., and Ms. Terry L. Roane, counsel, for the employer; and Mr. Malcolm Boyle, counsel, for the intervenors, also present Ms. Colette Levangie, student-at-law.

These reasons for decision were written by Mr. Calvin B. Davis, Member.

The Atlantic Communication and Technical Workers' Union (ACTWU) filed a certification application pursuant to section 24 of the Canada Labour Code seeking to represent:

*"all craft employees of Maritime Telegraph and Telephone Company Limited whose core functions are to provide installation, repair, technical, maintenance, construction or related services, including vehicle operations, building maintenance, warehousing or routine design work, but **excluding** foremen, supervisors and those above those ranks and those whose core functions are clerical or traffic."*

The applicant's letter dated February 18, 1993 states:

*"In light of the recent unanimous decision of the Canada Labour Relations Board in IBEW, Local 348 v. AGT Limited and Alberta Telecommunications Managers Association, Decision No. 984 (December 22, 1992), the AC&TWU is applying for bargaining units which are different from those presently certified by the Nova Scotia Labour Relations Board.*

*We ask that the Board undertake a comprehensive review of all positions of the Respondent, MT&T to determine which positions ought to be included in the two bargaining units applied for."*

Concurrent with this application, the union also filed a certification application for a unit composed of traffic employees of Maritime Telegraph and Telephone Company (MT&T). The Board considered this application and sent the following letter decision to the party. This decision has an effect and bearing on the present application. It is quoted in its entirety:

*"Dear Sirs:*

*This is an application for certification pursuant to section 24 of the Canada Labour Code filed with this Board by the Atlantic Communication and Technical Workers' Union (ACTWU). The applicant wishes to be certified as bargaining agent of the employees in the bargaining unit described as follows:*

*'All traffic employees of Maritime Telegraph and Telephone Company Limited whose core functions are to provide operator services for toll, directory or PABX services, but **excluding** Assistant Managers Operator Services and above the rank of Assistant*

*Managers Operator Services and those persons whose core functions are clerical or craft.'*

*A panel of the Board consisting of Vice-Chair Richard I. Hornung, Q.C., and Members Calvin Davis and François Bastien has reviewed the application. Its decision and the reasons thereof are set out below.*

I

*Maritime Telegraph and Telephone Company Limited (MT&T) is a Halifax-based company that provides provincial, interprovincial and international telecommunications services. Following the decision of the Supreme Court of Canada in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225; and (1989), 98 N.R. 264, this company is now considered a federally-regulated utility and its labour relations are governed by the Canada Labour Code. As of the date of application, it employed 3,986 persons in Nova Scotia of which 2,772 are unionized under the following bargaining unit structure:*

*a) Clerical and housekeeping employees*

*This unit, which has 1,177 employees, is represented by ACTWU which was certified as bargaining agent by this Board on January 22, 1991.*

*b) Telephone 'craft' employees*

*ACTWU, the applicant union, was certified by the Nova Scotia Labour Board in 1984 as bargaining agent for this group of 1,249 employees. A certification application for this group has been filed with this Board by the same agent, and it is currently being processed (Board file 555-3550).*

*c) Telephone 'traffic' or 'operator' employees*

*This unit consists of 346 persons, and is represented by ACTWU as its bargaining agent by virtue of a certificate issued by the Nova Scotia Labour Board in 1984. It is for this unit, augmented by an additional 10 positions, that the applicant is seeking certification in this application.*

## II

*One of the main issues raised in this application, and to be determined by this Board, relates to the inclusion of 10 positions which were previously excluded by the provincial Board. These positions are as follows:*

### *a) Force Administrator CAG*

*The duties performed by the four incumbents include forecasting volumes of work, designing and adjusting the work schedules of operators in addition to regular liaising with Network, Special Services, Methods Assistants and Market Development. Of the four incumbents, only Ms. R. Flemming has supervisory duties over clerical staff assigned to the group.*

### *b) Staff Assistant Force Administration*

*The single incumbent's main responsibilities are to analyze and upgrade the various tools and programs used by the Centralized Administration Group (CAG), to investigate to cost and to report on proposed changes to existing technology, as well as to provide corporate data for regulatory purposes. The incumbent supervises a member of the clerical bargaining unit.*

### *c) Methods Assistants*

*Three incumbents of the fifteen who work for the corporation are sought by the applicant. Their responsibilities include the development of practices and procedures for the entire corporation and the provision of advice to more senior management. Two of the three assistants presently have direct responsibility for subordinate staff.*

### *d) Methods Analysts*

*Only two of MT&T's 88 methods analysts work in the unit sought by the applicant. The duties of those positions vary with corporate needs but typically involve projects for which the incumbents administer their own capital and expense budgets. Representational and liaison duties are also regularly carried out.*

*It should also be noted that all the above positions are classified as Level 1 and, with the exception of the methods analysts, are rated*



as Band 4 whose pay range is currently \$38,432-\$45,752 per annum. Methods analysts are ranked a band above.

### III

The issue regarding the disputed positions revolves around the assumed scope of the present application. According to the employer, were the Board to grant the applicant federal bargaining rights, it need only adopt the wording of the provincial certificate issued in 1984. Should the Board consider expanding this unit, or the craft unit which is the subject of a separate if related application, the employer then submits that there exists a need for a broadly-based review process of the bargaining unit structure itself. As for the applicant union, its application states that the scope of the present bargaining unit certified by the provincial Board was not appropriate for collective bargaining, and that an order by this Board should be issued for a bargaining unit which is appropriate for collective bargaining under the Code. The applicant also referred to a recent decision of this Board (AGT Limited (1992), as yet unreported CLRB decision no. 984), to support the notion of different bargaining units under federal and provincial jurisdiction. Further, in its letter of February 18, 1993 introducing its craft unit application (Board parallel file 555-3550), and as referred to in the investigating officer's report covering the instant application, the applicant asks the Board to 'undertake a comprehensive review of all positions of the respondent MT&T to determine which positions ought to be included in the two units applied for.' In other words, the terms of the application for the craft unit would seem to suggest a wider scope of review than those pertaining to the instant application.

With regard to the units found appropriate in the above-mentioned AGT case, the Board notes the fact that the issue of appropriateness was not in dispute between the union and the employer. In keeping with its practice not to redefine, unless necessary, units that have been agreed to by the parties, the Board accepted the 'agreed to' bargaining units which swept into the unit employees not previously represented. As well, the vast majority of non-represented employees that the employer agreed were appropriate for inclusion were actually included by the Board in a previous decision as it found that the employees' work functions were similar to those of the employees in the present bargaining unit (Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726)). In that decision, the Board examined the factors at play in the transfer of

*bargaining rights from the provincial to the federal jurisdiction. They are worth repeating here:*

*'In determining bargaining units, it has long been held that the Board does not have to determine the most appropriate bargaining unit, but rather has only to certify an appropriate bargaining unit or appropriate bargaining units.*

*...*

*In determining whether an all-employee unit is appropriate in the instant case, reference must be made to the historical lack of community of interest between employees represented and those not represented. We must also consider the dissimilarities in the work, skills and qualifications of the two groups of employees. Finally, whereas wishes of employees are by no means determinative, there is no doubt that in the instant case, a large group of employees has objected to this process being used to include them within an all-employee bargaining unit. ...'*

*(pages 180 and 182)*

*On the matter of the appropriate scope of review pertaining to the present application, the Board's decision is to treat it separately from the one involving the craft unit. This is based on the fact that its particulars are such that it can be disposed of on its own, and that the other application is still not properly before us. Having said this, it must be made quite clear that the two files are related, and that any future decision in the pending application may indeed ultimately affect or have a bearing on the present determination. It follows that this is an interim decision pursuant to section 20 of the Code pending the final determination of any matter arising in any related application.*

*The issue that remains for the Board to decide in the present application is therefore whether the 10 disputed positions fall within the scope of the current telephone traffic or operator unit in which they would be swept. Or, are the core duties of those positions, or the overall working and career conditions of the persons carrying them out, fundamentally similar to those within the unit?*

*The applicant contends that the incumbents of the 10 disputed positions perform tasks similar to those of the members of the bargaining unit, work in the same departments, do not exercise*

*management functions, and do not have access to confidential matters relating to labour relations. Having examined in detail the job descriptions of the positions at issue, and the parties' submissions on the matter, the Board has come to the conclusion that the core duties of those positions differ markedly from the ones performed by the members of the bargaining unit in terms of skill requirements, work processes and environments, and nature of the reporting relationships.*

*For these reasons, they cannot be found to fall within the intended scope of the unit sought. However, the Board makes no determination, as it needs not to, with respect to the confidential or managerial nature of these same positions. Consequently, the Board has determined that the following bargaining unit is appropriate under the Code:*

*'all traffic employees of Maritime Telegraph and Telephone Limited whose core functions are to provide operator services for toll, directory or PABX services but **excluding** Assistant Managers Operator Services and those above, and those persons whose core functions are clerical or craft.'*

*Accordingly, a certification order for that unit is issued to the applicant along with this decision.*

*This is a unanimous decision of the Board, and is signed on its behalf by*

*François Bastien  
Board Member"*

The following three groups of employees sought intervention with respect to the application:

- (1) the Telephone Employees Level One Management Association;
- (2) the Telephone Association of Professional Engineers; and
- (3) the MT&T Managers Group.

As well, some employees sent letters in which they objected to the inclusion of these positions in the bargaining unit.

The parties to the application requested a hearing before the Board. The Board's practice on matters of inclusion or exclusion is to make its determinations without a public hearing. However, in this particular application, it deemed that a hearing was necessary. The parties were advised on the manner in which the Board wished to proceed.

*"As per its usual practice on matters of inclusion or exclusion of positions, the Board will not hear viva voce evidence on the positions at issue. Instead, it will receive any further documents or material relating to these positions that the parties wish to file, and, on the aforementioned dates, will hear presentation and submissions from counsel on the reasons why the positions in dispute should be included in, or excluded from, the appropriate unit."*

The disputed classifications sought for inclusion are as follows:

a) Business Sales and Services Department

business services advisor 6

b) Network Services

staff assistant 8

IOS SLS specialist (employer's letter of  
January 20, 1995 states position  
abolished) nil

c) Logistics and Real Estate

material coordinator 4

At the hearing, the union advised the Board that it was no longer seeking to include the position of technical associate in the bargaining unit.



The union claimed that the incumbents of the disputed positions are doing the same type of work as employees included in the bargaining unit. Even though they are classified as level I managers, the union submitted that they do not perform management functions, and are not employed in a confidential capacity relating to labour relations.

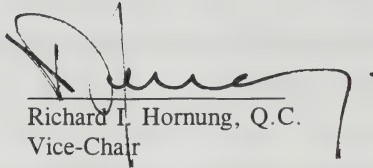
When a certification is sought because of a jurisdictional change and the parties have been in a long-term bargaining relationship, the Board will in most cases certify a bargaining unit that is similar to the provincial unit or one covered by the scope of the collective agreement. This means that a jurisdictional change is not to be used by a trade union to sweep in positions that were not previously included, nor by an employer to exclude positions that were previously in the unit.

However, the Board will not hesitate to include employees whose work functions are similar or identical to those in the existing bargaining unit. (See Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726).)

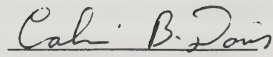
After hearing the parties' arguments and examining in detail the parties' submissions, the Board concluded that the positions sought are not the same as those covered by the scope of the collective agreement. The core duties of the disputed positions differ from the ones performed by members of the bargaining unit in terms of skill requirements, work processes, environments, and nature of the reporting relationship.

In issuing this decision, the Board is not determining whether or not the positions sought are management positions. It simply states that they do not fall within the intended scope of the unit.

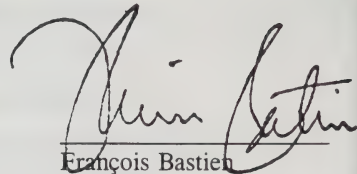
A certification order shall be issued forthwith.



Richard I. Hornung, Q.C.  
Vice-Chair



Calvin B. Davis  
Member



François Bastien  
Member

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## Summary

Al McDougall et al., *applicants*; Amalgamated Transit Union, Local 1587, *bargaining agent*; Can-Ar Transit Services, Division of Tokmakjian Limited, *employer*; and Can-Ar Transit Operators' Association (1996), *interested party*.

Board File: 566-28  
1188

Can-Ar Transit Operators' Association (1996), *applicant*; Can-Ar Transit Services, Division of Tokmakjian Limited, *employer*; and Amalgamated Transit Union, Local 1587, *interested party*.

Board File: 555-4029

Can-Ar Transit Operators' Association, *applicant*; Amalgamated Transit Union, Local 1587, *respondent*; and Can-Ar Transit Operators' Association (1996), and Al McDougall et al., *interested parties*.

Board File: 580-291

Amalgamated Transit Union, Local 1587, *complainant*; Can-Ar Transit Services, Division of Tokmakjian Limited, *respondent*; and Can-Ar Transit Operators' Association (1996) and Al McDougall et al., *interested parties*.

Board File: 745-5316

## Résumé

Al McDougall et autres, *requérants*; Syndicat uni du transport, section locale 1587, *agent négociateur*; Can-Ar Transit Services, Division of Tokmakjian Limited, *employeur*; et Can-Ar Transit Operators' Association (1996), *partie intéressée*.

Dossier du Conseil: 566-28

Can-Ar Transit Operators' Association (1996), *requérant*; Can-Ar Transit Services, Division of Tokmakjian Limited, *employeur*; et Syndicat uni du Transport, section locale 1587, *partie intéressée*.

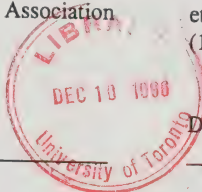
Dossier du Conseil: 555-4029

Can-Ar Transit Operators' Association, *requérant*; Syndicat uni du transport, section locale 1587, *intimé*; et Can-Ar Transit Operators' Association (1996) et Al McDougall et al., *parties intéressées*.

Dossier du Conseil: 580-291

Syndicat uni du transport, section locale 1587, *plaignant*, Can-Ar Transit Services, Division of Tokmakjian Limited, *intimé*; et Can-Ar Transit Operators' Association (1996) et Al McDougall et al., *parties intéressées*.

Dossier du Conseil: 745-5316



This decision rules upon several related applications from the different parties in this case, namely:

- (1) a petition to terminate the bargaining rights of the Amalgamated Transit Union, Local 1587 (the "revocation application"), filed by Al McDougall pursuant to section 38(3) of the Code (Board File 566-28);
- (2) a certification application filed by the Can-Ar Transit Operators' Association (1996) (Board File 555-4029);
- (3) an application filed by the Can-Ar Transit Operators' Association pursuant to section 43(2) of the Code for a determination directing the manner in which its assets are to be disposed of (Board File 580-291);
- (4) a complaint presented by the Amalgamated Transit Union, Local 1587 (the "ATU" or the "Union"), alleging violation of sections 50, 94 and 96 of the Code by the employer, Can-Ar Transit Services, Division of Tokmakjian Limited (Board File 745-5316).

Further issues raised concern the status of the voluntarily recognized trade union to participate in the proceedings as well as a motion for dismissal presented by the Union.

La présente décision porte sur les demandes suivantes déposées par diverses parties en l'espèce:

- (1) une demande en vue de mettre fin aux droits de négociation du Syndicat uni du transport, section locale 1587 (la «demande de révocation»), présentée par Al McDougall en vertu du paragraphe 38(3) du Code (dossier du Conseil 566-28);
- (2) une demande d'accréditation présentée par la Can-Ar Transit Operators' Association (1996) (dossier du Conseil 555-4029);
- (3) une demande présentée par la Can-Ar Transit Operators' Association en vertu du paragraphe 43(2) du Code en vue d'obtenir une décision concernant la façon dont ses avoirs devraient être liquidés (dossier du Conseil 580-291);
- (4) une plainte déposée par le Syndicat uni du transport, section locale 1587 (le «SUT» ou le «syndicat»), alléguant violation des articles 50, 94 et 96 du Code par l'employeur, Can-Ar Transit Services, division de Tokmakjian Limited (dossier du Conseil 745-5316).

D'autres questions soulevées portaient sur la question de savoir si le syndicat reconnu volontairement détenait un statut lui permettant de participer aux procédures et sur une requête demandant le rejet présentée par le syndicat.

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The Board ruled that the ATU, a voluntarily recognized trade union, having provided the requisite notice in accordance with section 49(1) of the Code, had maintained its status as bargaining agent following the expiry of the collective agreement and had full standing for the purposes of the proceedings.

Following the evidence in chief, the Union presented a motion in the nature of a motion for non-suit. In particular circumstances, it may be appropriate to allow such a motion before requiring parties to participate in lengthy and costly litigation. In this case, the Board considered that sufficient evidence had been presented to allow it to determine the certification and revocation applications without the need for any further evidence.

The motion for dismissal of the certification application was granted. The Board found that the new Association was not a trade union within the meaning of the Code in that it did not satisfy the established requirements to obtain trade union status. As such, it could not be certified.

The motion to dismiss the revocation application was also granted. Various acts and statements by the employer - including uncustomary meetings with employees after the Union came in, the creation of job insecurity, and support of anti-union activities at the worksite - together with the lack of any satisfactory evidence regarding the payment of legal fees led the Board to conclude that the revocation application was not free from employer influence. This application was dismissed without the holding of a vote.

Le Conseil a jugé que le SUT, un syndicat reconnu volontairement, ayant signifié l'avis prévu au paragraphe 49(1) du Code, avait conservé son statut d'agent négociateur après l'expiration de la convention collective et avait qualité d'agir dans le cadre de la présente procédure.

À la suite de l'examen en chef, le syndicat a présenté une requête de type requête de non-lieu. Dans certaines circonstances, il y a lieu d'accueillir une telle requête avant d'exiger que les parties participent à une procédure longue et coûteuse. En l'espèce, le Conseil a jugé que la preuve présentée était suffisante pour lui permettre de trancher les demandes de révocation et d'accréditation sans autres éléments de preuve.

La requête demandant le rejet de la demande d'accréditation a été agréée. Le Conseil a jugé que la nouvelle Association n'était pas un syndicat au sens du Code en ce sens qu'elle ne satisfaisait pas aux critères établis en vue d'acquérir le statut de syndicat. Par conséquent, elle ne pouvait être accréditée.

La requête demandant le rejet de la demande de révocation a elle aussi été agréée. Divers gestes et déclarations de la part de l'employeur - y compris les rencontres inhabituelles avec les employés après l'arrivée du syndicat, la création d'insécurité en ce qui avait trait à leur emploi, et l'appui d'activités antisyndicales au lieu de travail - ainsi que le manque de preuve satisfaisante concernant le paiement de frais d'avocat ont amené le Conseil à conclure que la demande de révocation n'était pas exempte de l'influence de l'employeur. Cette demande a été rejetée sans tenir de scrutin.

No determination was made with respect to the application regarding the disposition of the Association's assets given its undertaking to transfer the funds in its account to the Union.

With respect to the unfair labour practice complaint, in the circumstances of the case, the Board issued a declaration regarding the obligation of the parties to commence bargaining immediately rather than rule on the merits of the complaint.

Aucune décision n'a été prise quant à la demande portant sur la liquidation des avoirs de l'Association étant donné que cette dernière s'était engagée à transférer au syndicat les fonds qui se trouvaient dans son compte.

Quant à la plainte de pratique déloyale de travail, le Conseil a décidé dans les circonstances de faire une déclaration selon laquelle les parties devaient entamer des négociations immédiatement, plutôt que de se prononcer sur le bien-fondé de la plainte.

## Reasons for decision

Al McDougall et al.,

*applicants,*

Amalgamated Transit Union, Local 1587,

*bargaining agent,*

Can-Ar Transit Services, Division of  
Tokmakjian Limited,

*employer,*

*and*

Can-Ar Transit Operators' Association (1996),

*interested party.*

Board File: 566-28

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Can-Ar Transit Operators' Association (1996),

*applicant,*

Can-Ar Transit Services, Division of  
Tokmakjian Limited,

*employer,*

*and*

Amalgamated Transit Union, Local 1587,

*interested party.*

Board File: 555-4029

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Can-Ar Transit Operators' Association,

*applicant,*

Amalgamated Transit Union, Local 1587,

*respondent,*

*and*

Can-Ar Transit Operators' Association (1996),  
and Al McDougall et al.,

*interested parties.*

Board File: 580-291

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Amalgamated Transit Union, Local 1587,

*complainant,*

Can-Ar Transit Services, Division of  
Tokmakjian Limited,

*respondent,*

*and*

Can-Ar Transit Operators' Association (1996)  
and Al McDougall et al.,

*interested parties.*

Board File: 745-5316

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CLRB/CCRT Decision no. 1188

November 6, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Messrs. Michael Eayrs and David Gourdeau, Members.

Appearances

File 566-28:

Mr. Milton Verskin, for Al McDougall et al.;

Mrs. Elizabeth M. Mitchell, assisted by Mr. Simon Clarke, for the Amalgamated Transit Union, Local 1587;

Mr. Christopher C.E. Eames, assisted by Messrs. Tokmakjian and Vincent Iacovone, for Can-Ar Transit Services, Division of Tokmakjian Limited; and

Mr. Milton Verskin, for the Can-Ar Transit Operators' Association (1996).

File 555-4029:

Mr. Milton Verskin, for Can-Ar Transit Operators' Association (1996); and

Mr. Christopher C.E. Eames, assisted by Messrs. Cy Tokmakjian and Vincent Iacovone, for Can-Ar Transit Services, Division of Tokmakjian Limited; and

Mrs. Elizabeth M. Mitchell, assisted by Mr. Simon Clarke, for the Amalgamated Transit Union, Local 1587.

File 580-291:

Mr. Milton Verskin, for the Can-Ar Transit Operators' Association;

Mrs. Elizabeth M. Mitchell, assisted by Mr. Simon Clarke, for the Amalgamated Transit Union, Local 1587;

Mr. Milton Verskin, for the Can-Ar Transit Operators' Association (1996); and

Mr. Milton Verskin, for Al McDougall et al.

File 745-5316:

Mrs. Elizabeth M. Mitchell, assisted by Mr. Simon Clarke, for the Amalgamated Transit Union, Local 1587;

Mr. Christopher C.E. Eames, assisted by Messrs. Cy Tokmakjian and Vincent Iacovone, for Can-Ar Transit Services, Division of Tokmakjian Limited;  
Mr. Milton Verskin, for Can-Ar Transit Operators' Association (1996); and  
Mr. Milton Verskin, for Al McDougall et al.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

## I

### The Applications

The following applications were presented to the Board:

- a) a petition filed by Mr. Al McDougall et al. for a declaration that the bargaining rights of the Amalgamated Transit Union, Local 1587, be terminated (Board file no. 566-28);
- b) an application for certification filed by the Can-Ar Transit Operators' Association (1996) to represent all transit operators in the Can-Ar Transit Services Division employed under the contract with the Town of Vaughn (Board file 555-4029);
- c) an application pursuant to section 43(2) of the Canada Labour Code by the Can-Ar Transit Operators' Association for a determination directing the manner in which the applicant's assets are to be disposed of (Board file no. 580-291); and
- d) a complaint presented by the Amalgamated Transit Union, Local 1587, alleging that Can-Ar Transit Services, Division of Tokmakjian Limited, has violated sections 50, 94, and 96 of the Canada Labour Code (Board file 745-5316).

The Board held a hearing on April 16-18, 1996 and April 22, 1996 in Toronto. On April 18, 1996, following the evidence in support of the above-mentioned petition and applications, counsel for the Amalgamated Transit Union, Local 1587, presented a motion for dismissal. The parties submitted arguments on the merits of each file and requested that the Board rule on the motion before concluding the hearing. The Board reconvened on April 22, 1996 and after counsel had the opportunity to make further submissions, the Board orally provided the parties with its rulings, with reasons to follow. These are the reasons.

## II

### The Background

Tokmakjian Limited is comprised of a number of divisions involved primarily in the area of transportation. It operates both provincially and, on a regular basis, beyond Ontario to various destinations in Canada and in the United States. The division affected by these proceedings is Can-Ar Transit Services, Division of Tokmakjian Limited ("Tokmakjian" or the "employer"). This division, which operates pursuant to a contract with the Town of Vaughn in the Regional Municipality of York, Ontario, provides both vehicles and drivers to operate the Town of Vaughn's municipal transit system. Currently, there are 25 full-time transit operators and 15 part-time operators.

In 1985 Tokmakjian acquired the transit contract from the Town of Vaughn and became a successor employer and party to the collective agreement concluded with the Canadian Brotherhood of Railway, Transport and General Workers (the "CBRT"). In the latter part of 1986 or early in 1987, following the decertification of the CBRT, the employees of Tokmakjian formed an informal association which was voluntarily recognized by their employer. This association subsequently became the Can-Ar Transit Operators' Association (the "Association"). On April 12, 1991 the Association was certified by the Ontario Labour Relations Board to represent the full-time drivers employed by Tokmakjian. The Association and Tokmakjian concluded a collective agreement on April 6, 1992, initially for a two-year term from January 1, 1990 until

December 31, 1992. The agreement subsequently renewed automatically unless written notice was provided by either party within 90 days prior to the expiry date.

On April 9, 1995, the Association merged with the Amalgamated Transit Union, local 1587 (the "ATU" or the "Union"). On November 7, 1995, following an application by the new entity pursuant to section 43 of the Code, this Board determined that Tokmakjian's operations fall under federal jurisdiction and declared the ATU to have succeeded the provincially certified Association as a voluntarily recognized bargaining agent. As such, it had acquired all the rights, privileges and duties of the Association with respect to the unit of transit operators of that Association. (See Can-Ar Transit Services, Division of Tokmakjian Limited, November 7, 1995 (LD 1482).)

By virtue of the applications filed in the present case, certain employees seek to terminate the bargaining rights of the ATU and to certify their own association, the Can-Ar Transit Operators' Association (1996) (the "new Association"). The ATU maintains that the new Association is not a trade union and that both applications should be rejected because they are tainted by employer influence or domination. The ATU in turn has filed an unfair labour practice complaint alleging employer intimidation and interference as well as a violation of the employer's duty to bargain in good faith. In addition, the Association and the ATU dispute the ownership of existing assets.

### III

#### The Status of the ATU

As a preliminary matter, counsel for the petitioners questioned the right of the Union to intervene in the proceedings. Counsel sought to distinguish the rights of a certified union from a voluntarily recognized one. He argued that the collective agreement which had been concluded with the employer expired on December 31, 1995 and, consequently, that the ATU retained no rights after December 31, notwithstanding that the ATU had served notice to bargain on the employer. Counsel submitted, based



upon the provisions of sections 48 and ss. of the Code, that following the expiry of the collective agreement only a certified union may retain bargaining rights.

After hearing the parties' submissions, the Board ruled that the ATU had full standing for the purposes of these proceedings.

A union may acquire bargaining agent status pursuant to section 3(1)(b) of the Code by virtue of it having concluded a collective agreement on behalf of the employees in a bargaining unit:

- (i) the term of which has not expired, or
- (ii) in respect of which the trade union has, by notice given pursuant to subsection 49(1), required the employer to commence collective bargaining.

Section 49 of the Code states:

*"49. (1) Either party to a collective agreement may, within the period of three months immediately preceding the date of expiration of the term of the collective agreement, or within such longer period as may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement."*

In the present case, the ATU served notice to bargain on the employer, pursuant to section 49(1) of the Code, on November 7, 1995. At that time, the collective agreement between the Union and the employer had not expired and the ATU, by virtue of section 3(1)(b)(i), was the bargaining agent.

The termination of a collective agreement does not end the collective bargaining relationship between an employer and a voluntarily recognized bargaining agent if timely notice is given. On the contrary, once notice is given in accordance with

section 49(1), the parties are required, pursuant to section 50 of the Code, to commence collective bargaining for the purpose of entering into a collective agreement irrespective of whether the previous agreement was negotiated as a result of voluntary recognition or pursuant to a certification order of the Board. Section 49 does not speak of bargaining agents; rather it refers to the "parties" to the collective agreement. It is clear, in such circumstances, that the Code makes no distinction between a certified union or a voluntarily recognized union with respect to the obligation to bargain collectively. (See Canadian Broadcasting Corporation (1994), 94 di 156 (CLRB no. 1072).) Consequently, having provided the requisite notice in accordance with section 49(1) of the Code, the ATU maintained its status as bargaining agent upon the expiry of the collective agreement and is properly a party before the Board in these proceedings.

#### IV

#### The Evidence

The major part of the evidence at the hearing was directed at the issue of alleged employer influence in the revocation application filed by "certain employees" and in the certification application filed by the new Association. The Board heard testimony from Ms. Maria Godfrey, President of the new Association, and Mr. Al McDougall, its Secretary-Treasurer. These two employees described the events and circumstances which led to the above-mentioned applications.

The employees affected by these applications are transit drivers whose employment with Tokmakjian is dependent upon Tokmakjian's contract with the Town of Vaughn. This contract was acquired by the employer in 1985 and was renewed on a regular basis. Prior to 1995, the employees had no involvement in its acquisition or in its renewal.

In June 1995, however, following the merger of the Association with the ATU, the renewal of this contract with the Town of Vaughn was raised for the first time.

Mr. Cy Tokmakjian, President of Can-Ar Transit Services, met Mr. McDougall and Mr. Patrick O'Day (the representatives of the ATU at that time) and advised them that he had not decided whether he would be renewing the company's contract with the Town of Vaughn. In response to their questions about successor rights, Mr. Tokmakjian told them that in all probability they would not be out of work; if he did not accept the contract, Laidlaw would presumably take it over. Mr. McDougall testified that it was common knowledge that this latter company paid less than Tokmakjian. He also stated that Mr. Tokmakjian mentioned his interest in having his company take over the transit services of three other municipalities. If this occurred, the ATU would then be acceptable to Mr. Tokmakjian given the increase in business that the amalgamation would generate.

The renewal of the Town of Vaughn contract was of major concern to the employees. Since their work consisted solely of driving the Town of Vaughn's buses, they wanted assurance that they would still have a job at the end of the contract. The issue was discussed at a meeting with the employees held by Mr. Tokmakjian in October 1995. According to Ms. Godfrey, Mr. Tokmakjian indicated that he was considering giving up the contract but had not made up his mind. Ms. Godfrey could not recall having had discussions concerning this question in previous years. The renewal of the contract was considered to be a management issue.

During the month of October 1995, a vote, organized by Mr. O'Day, was held amongst the employees of the bargaining unit. Mr. McDougall testified that its purpose was to "clear the air" and to determine whether they still wished to be represented by the ATU. The voting took place on company premises during company time and the ballots, numbered according to seniority, could be matched with the employees who cast them. This was in contrast to other union activities which were always held away from company property and where voting took place by secret ballot. Mr. McDougall, in his testimony, stated that management "had to know" about the vote since everyone was aware of it. The results showed the majority of

employees had voted in favour of maintaining the ATU as their representative. According to Mr. McDougall, Mr. O'Day was upset with the outcome.

Sometime during the following month, Mr. O'Day was removed by the ATU from his position as a union steward. He nevertheless continued to meet with management as did Mr. McDougall. Although all the meetings were allegedly business related, Mr. McDougall stated that Mr. O'Day was "stirring the pot" and "pestering" him on a daily basis.

At the end of October or November 1995, the employer ceased remitting union dues. Apparently Mr. O'Day had told the company not to deduct the dues. Mr. McDougall, while acting as ATU steward, neither objected to the non-payment of union dues nor did he notify the ATU.

On December 5, 1995, Mr. Tokmakjian notified the employees in writing of a meeting to be held on December 10, 1995. On the same date, Mr. McDougall circulated a memo amongst the employees which he referred to as "Points to Ponder". This memo advised the employees that if the company did not keep the (Town of Vaughn) contract, they would have no successor rights and invited them to sign a petition in order "to try and get the Union out". Mr. McDougall then proceeded to obtain signatures for the petition.

The meeting, attended by the majority of employees, was held in the company's boardroom in the presence of Mr. Tokmakjian and the Operations Manager, Mr. Berg Hagopien. The meeting was described by Mr. McDougall as a "question and answer meeting." The discussion centered around the Town of Vaughn contract. When questioned by the employees about their future with the company, Mr. Tokmakjian again told the employees that he had not yet decided whether or not he would renew the contract. In the event that he did not do so, he advised the employees that the contract would be put up for bids. He spoke of the possibility for them to obtain



employment with either Laidlaw or Richmond Hill at wage rates that were lower than those of his company.

Both witnesses claimed that the meeting did not deal with the Union. However, the issue of the amount of union dues was discussed amongst the employees in the presence of Mr. Tokmakjian and the Operations Manager. During the course of the meeting, Mr. Tokmakjian advised the employees that if he did accept the contract, he could work with the Union but, in such circumstances, it would be necessary to separate the unionized and non-unionized employees which would entail other facilities and additional managers. Given the considerable expenses that this would involve, the contract with the union would have to be renegotiated. According to Ms. Godfrey, Mr. Tokmakjian told them he was not opposed to the union - it was up to them to decide. Similarly, Mr. McDougall testified that Mr. Tokmakjian suggested that the employees get together, go out for coffee to discuss their problems and then make up their minds.

Following the December 10 meeting, Mr. McDougall obtained the remainder of the signatures he required for the petition seeking to terminate the ATU's bargaining rights. He met the employees in the drivers' room when they took their breaks and made himself available by standing on the road in front of the company's premises.

Upon the suggestion of Mr. O'Day, Mr. McDougall contacted Mr. Verskin in the latter part of December 1995 for legal advice. Mr. McDougall and Mr. O'Day met with counsel in January 1996. The application for termination of bargaining rights was filed with the Board on February 2, 1996 by Mr. Verskin on behalf of Mr. McDougall and certain employees.

On February 18, 1996 a meeting was held to form a new Association although both Ms. Godfrey and Mr. McDougall were aware that the ATU had already begun to negotiate with the employer. Ms. Godfrey's explanation for the creation of another association was that the employees wished to begin anew with a completely different

executive. She testified that at the founding meeting, five officers were elected. This was the only vote held. Sometime after the meeting, the secretary-treasurer resigned. Ms. Godfrey called the Vice-President and they decided to appoint Mr. McDougall, a former representative, as secretary-treasurer since he had previous experience. Ms. Godfrey explained that they filled the vacancy in accordance with the procedure provided for in the "old constitution" (i.e. that of the previous Association). When questioned about the new Association's finances, she stated that it does not have a bank account nor a signing officer. Following the initial payment of \$5.00, no further sums had been paid to the new Association.

During the course of the hearing, Mr. McDougall was cross-examined concerning a letter from the ATU's counsel to Mr. Tokmakjian confirming the forthcoming negotiation meetings. Although the letter was not copied to Mr. McDougall, Mr. Verskin, counsel for the petitioners and for the Association, had written to the ATU's counsel, stating that the letter marked for the attention of Mr. Tokmakjian was given to him by his clients.

Mr. McDougall initially testified that management had provided him with a copy of the letter; subsequently he stated that he had not seen the correspondence prior to his meeting with Mr. Verskin and that, when he met with him, Mr. Verskin already had the letter.

Another issue raised during the hearing concerned the payment of legal fees. Ms. Godfrey testified that she had asked Mr. McDougall if the company was assuming the cost of the fees but was told that he had personally borrowed the necessary funds. Mr. McDougall, in his testimony, stated that the initial payment was from the Association's account. He then discussed the matter with his spouse who agreed to lend him the money he required. He expected reimbursement from the employees. He did not know the amount of the fees nor whether the bills would be sent to the new Association since he had never seen the account. When questioned

about a rumour that the legal fees would be paid by the company, Mr. McDougall replied that it was simply a rumour.

## V

### Motion for Dismissal

Following the evidence, counsel for the ATU presented a motion in the nature of a "non-suit", requesting that the Board dismiss both the petition to terminate the ATU's bargaining rights (the "revocation application") and the certification application, without prejudice to its right to call evidence in the event its motion did not succeed. The essence of the Union's submission is that, since neither applicant had made out its case in chief, the proceedings should end at this point.

The Board decided not to require the union to elect whether it wished to call evidence before hearing its motion given that no party had asked that it be put to this election. Prior to considering whether or not it was appropriate to continue the proceedings and after giving the parties full opportunity to lead evidence, the Board asked for representations with respect to the ATU's motion. The arguments presented both initially and when the hearing reconvened dealt with the merits of the applications. In addition, the employer sought to reserve its right to present further evidence should the motion fail and was advised that it would have an opportunity to do so should the motion indeed fail.

While a motion for non-suit generally arises in civil or criminal proceedings, the Board being empowered to determine its own practice and procedure may entertain a request which has the same purpose, namely the early dismissal of a case. This is not a procedure which has been frequently presented to the Board nor is it one which is readily granted (see Canadian National Railway Company (1994), 95 di 78; and 94 CLLC 16,061 (CLRB no. 1081); Canadian Pacific Limited (1991), 86 di 54 (CLRB no. 892); and Canadian National Railway Company (1991), 83 di 216 (CLRB no. 845)). However, in certain circumstances, it may be opportune to allow a party to

argue that there is no case for it to meet before requiring that all the parties participate in lengthy and costly litigation. This is particularly so where it appears that an application will not succeed no matter what evidence is put forward (see Hurley Corporation, [1992] OLRB Rep. August 940).

In the present instance, the Board considered that sufficient evidence had been presented for it to determine both the revocation application and the application for certification without the need for any further evidence. In the Board's view, to prolong the proceedings in such circumstances would neither be beneficial to the parties nor would it be consistent with sound labour relations. Consequently, the Board ruled on the motion for dismissal as set out below.

## VI

### **The Application for Certification**

The ATU requested that the certification application presented by Can-Ar Transit Operators' Association (1996) ("the new Association") be dismissed since it has not established its status as a trade union under the Code. The Union claimed the founding meeting does not respect the minimum requirements which must be met in this respect.

The Union's principal submission is that the organization has no constitution. The constitution referred to by the applicant is that of the previous association while the second constitution before the Board was not dated nor was it discussed or adopted at the meeting. Alternatively, the Union submitted, if the employees had validly adopted a constitution, it was not followed. The elected officers were not named according to the requirements provided for in the constitution, and the issues of initiation fee and monthly dues were not addressed. According to the Union, these defects are so serious that it is impossible to conclude that the Association is a legitimate trade union under the Code.



Counsel for the new Association claimed that the employees had in fact signed the new constitution, which is preferable to a simple show of hands. He disputed allegations that the members did not follow the constitution after ratification and argued that, if any irregularity did occur, it does not detract from the new Association's status as a trade union. For these reasons, he submitted that the new Association has the requisite status to apply for certification.

The Board, on many occasions, has established the conditions that must be met in order for an organization to be recognized as a trade union under the Code. (See Canada Ports Corporation (1993), 92 di 211; 21 CLRBR (2d) 281; and 94 CLLC 16,003 (CLRB no. 1031); Chatham Coach Lines (1989), 77 di 41; and 89 CLLC 16,018 (CLRB no. 733); Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59); Canadian Pacific Express and Transport (1988), 73 di 183 (CLRB no. 682); Conseil des Montagnais du Lac St-Jean (1982), 50 di 190 (CLRB no. 405); Capital Coach Lines Ltd. (Travelways) (1980), 40 di 5; [1980] 2 Can LRBR 407; and 80 CLLC 16,011 (CLRB no. 233); and Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231).)

The essential elements consist of the following:

- (1) there must be an organization;
- (2) the organization must consist of employees; and
- (3) one of the purposes of the organization must include the regulation of relations between employers and employees.

In addition, in order to be recognized, the organization must be formalized and be regulated by a constitution and by-laws.

The Board has repeatedly stated that it will not be overly technical in examining the language of an organization's constitution and by-laws or the methods of their adoption. Furthermore, the Board will not allow technical defects which may exist to defeat the rights of employees under the Code. However, at the very minimum, for an organization to be recognized as a trade union, it must be bound by a constitution. (See Yellowknife Direct Charge Co-operative Limited, August 30, 1995 (LD 1466).)

The Board has also held that union officers must hold their office according to the provisions of the constitution, and that a defect in this regard is fatal to an applicant's claim to status as a trade union within the meaning of the Code (see Canadian Pacific Limited (59), supra).

In the present case, the defects are numerous. According to the testimony of Ms. Godfrey, President of the new Association, only one vote was held at the founding meeting and that was to elect officers. When the secretary-treasurer resigned, he was replaced in accordance with the "old constitution" of the previous Association. There is no evidence that the employees attending the meeting were admitted to membership. In fact, the membership information on file shows that several employees joined the association days before the founding meeting even took place. There is also no evidence that a constitution and by-laws were presented, discussed, adopted or ratified at a meeting of employees.

The new Association did file with the Board a constitution that contains signatures under the heading "signatures of president, secretary, and founding members". While it is perhaps arguable that the signing of a constitution may fulfil the same function as a vote, in this instance, the constitution is undated and there is no indication on the document itself as to when and where it was signed. This second constitution is identical to the one that had been adopted by the previous Association with two exceptions: the year "1996" has been added by hand to the name of the Association, and the location of the founding meeting and its date have been deleted from the

document. No evidence was adduced to establish when the document was signed or under what circumstances.

In the present case, irregularities pervade the establishment of the new Association and continue subsequent to the founding meeting. The entire process is flawed. However, most important is the fact that the organization is not bound by a constitution which is valid. As a result, we conclude that the new Association is not a trade union within the meaning of the Code and cannot be certified as the bargaining agent for the transit operators of Can-Ar Transit Services, Division of Tokmakjian Limited. In the circumstances, it is not necessary to rule on the alternative argument raised by the ATU, namely the issue of employer influence or domination.

The Board therefore grants the motion presented by the ATU and dismisses the application for certification presented by the Can-Ar Transit Operators' Association (1966).

## **VII**

### **The Petition Seeking the Termination of ATU's Bargaining Rights**

The petition presented by Mr. McDougall et al. seeks a declaration that the bargaining rights of the ATU be terminated. The ATU, following the evidence, asked the Board to dismiss this petition on the grounds of employer influence. The ATU pointed to various actions and comments on the part of Tokmakjian which it claims illustrate the lack of an arm's length relationship between the employer and the petitioners. Such acts and comments include peremptory meetings with employees after the ATU came in, reference to the union as "a headache", threats to job security, support of the anti-union forces, and the lack of clear evidence with respect to the payment of the legal fees involved.

The employer denied that it had acted improperly and submitted that there was no evidence that it had provided financial assistance, that it had encouraged or arranged for the October vote regarding the ATU, or that it knew who the (petition's) supporters were. The employer claimed that meetings were held to keep its employees informed, consistent with its style of management. Advising them as to the uncertainty of continuing the transit contract did not constitute a threat; rather it was an expression of the true factual situation. The employer maintained that while the ATU had the support of the employees as of October 1995, they had since changed their minds and were acting on their own.

Counsel for the petitioners disputed the Union's claim that the employer's reluctance to commit to the Town of Vaughn contract was due to the presence of the ATU. That aspect of the business was not profitable and the employer was simply stating what everyone knew, namely that the contract would not be renewed forever. In his submission, the insecurity regarding the renewal of the Vaughn contract gave rise to "turbulent events", but this related to a business reality and could not be attributed to the employer.

Counsel denied that the employees had been subject to any threats or intimidation as the information provided constituted statements of fact. Moreover, the timing of the petition was not unusual considering the context of insecurity. When the Union did not allay this prevailing insecurity, the members decided they wanted their own association.

Both the employer and counsel for the petitioners submitted that the employer did not have to pretend that it wanted the Union nor that it was pleased with its presence. It was sufficient, as indicated by the evidence, that the employer was prepared to deal with the ATU.

The Canada Labour Code provides for the revocation of bargaining rights within specified time limits when a majority of employees in a bargaining unit no longer wish



to be represented by a bargaining agent. However, notwithstanding majority support for the revocation application, in light of the circumstances of this case, it is necessary to decide whether the application was unlawfully influenced by the employer, as alleged by the ATU.

The Board has repeatedly stated that the choice of a union belongs to employees and not to the employer. Consequently, an application to revoke bargaining rights, as an application for certification, must be free from any employer influence in all respects (see Transport V.A. Inc. (1994), 95 di 1 (CLRB no. 1077); Royal Oak Mines Inc. (1993), 92 di 153; and 93 CLLC 16,063 (CLRB no. 1028); Rogers Cable T.V. Ltd. (Hamilton) (1992), 88 di 84; and 92 CLLC 16,053 (CLRB no. 942); La Sarre Air Services Limited (Propair Inc.) (1982), 49 di 52 (CLRB no. 377); and Marcel Roussel et al. (1977), 19 di 140; [1977] 2 Can LRBR 238; and 77 CLLC 16,106 (CLRB no. 73)). Furthermore, section 94(1)(a) of the Code expressly prohibits an employer from interfering in the affairs of a trade union or financially contributing to it.

An analysis of the evidence leads the Board to conclude that this petition was not indicative of a desire on the part of the employees to terminate the bargaining rights of the ATU but resulted from the employer's influence.

The evidence established that for a number of years prior to the presence of the ATU in the workplace, Mr. Tokmakjian had been too occupied to meet with the employees. However, when the ATU came in, meetings were held in May, October and December 1995.

The meetings had a recurring theme, namely that Mr. Tokmakjian was uncertain whether or not he would be renewing the contract with the City of Vaughn. This contract, it will be recalled, had been renewed regularly in the past by Mr. Tokmakjian without any employee involvement. It should also be remembered that the employees were dependent upon this contract for their continued employment with Tokmakjian. The meetings did little to allay their concerns. On the contrary, the

discussions increased their sense of insecurity. Mr. Tokmakjian told the employees that the transit division was not profitable and if he did not renew the contract, employment with other employers would be at lower pay. Moreover, even if the contract were accepted, wages would still be affected. Mr. Tokmakjian warned them that other facilities as well as extra management would be required for the separation of the unionized and non-unionized employees, the obvious consequence being a salary reduction for the employees. The message was well understood: their employer was not pleased with the presence of the ATU.

The timing of the petition against the ATU is cause for concern. On December 5, Mr. Tokmakjian sent a notice for a meeting to be held on December 10. On the same day, Mr. McDougall sent a notice entitled "Points to Ponder." He also had the petition available to be signed and made himself accessible to the employees by standing in front of the company's premises. Subsequent to the December 10th meeting, Mr. McDougall managed to obtain the remainder of the signatures he required.

The explanation concerning the payment of the legal fees involved in preparing and presenting the petition leaves much to be desired. Mr. McDougall stated that initially he used the Association's assets to pay counsel. He then testified that his spouse was prepared to lend him the funds he needed. He expected to be reimbursed by the employees after they had seen the results of his initiative. If not, he claimed he was willing to assume the burden himself.

While Mr. McDougall was the one who instituted the proceedings, when questioned about the balance of payments, he replied that he did not pay the accounts. He had no knowledge as to who would be responsible for them nor did he know the amount of the fees. In fact, he had never seen the legal bill. Furthermore, he did not know who instructed counsel.

The Board does not believe that Mr. McDougall was personally prepared to accept the cost of the petition nor does it accept that the account would be assumed by the employees.

While there is no direct evidence that the employer has paid or will pay the legal fees involved, the explanations provided by the witnesses are totally unsatisfactory and the Board infers from the circumstances that someone besides Mr. McDougall was prepared to pay for these services.

The conduct of the employer - in creating and maintaining insecurity with respect to continued employment, in discussing the separation of unionized drivers and the consequent renegotiation of their collective agreement, in turning a blind eye to anti-union activities at the worksite, in encouraging the employees to get together to resolve their problems amongst themselves - sent a clear message to its employees: they would be better off without the union.

The evidence presented leaves no doubt that the petition was unlawfully influenced by the employer. The Board having concluded that the application is not free from employer influence is not satisfied that the petition truly reflected the wishes of the employees in the bargaining unit to cease being represented by the ATU. Furthermore, the Board considers that it would not be appropriate to hold a vote in such circumstances.

In light of the foregoing, the Board grants the motion for dismissal presented by the ATU and dismisses the petition of Al McDougall et al. seeking the termination of the bargaining rights of the ATU. Accordingly, the ATU will remain the bargaining agent for the employees of Can-Ar until such time as its status as bargaining agent is terminated in accordance with the Code.

## VIII

### **Application to Determine the Ownership of Disputed Assets**

File no. 580-291 concerns the application filed by Can-Ar Transit Operators' Association pursuant to section 43(2) of the Code for a determination directing the manner in which the assets of the Association are to be disposed. Specifically, the applicant is seeking a declaration from the Board which would determine the ownership of the assets in question. In response to this application, the ATU demanded that the Association remit to the ATU all property currently within its possession, custody, or control or which belonged to the Association on November 7, 1994.

At the hearing, counsel for the Association stated that his client had agreed to transfer the funds in its account to the ATU if the motion for dismissal presented by the Amalgamated Transit Union, Local 1587, were granted.

The Board has taken cognizance of the Association's undertaking in this regard, and accordingly no determination of this application has been made. The Board, however, retains jurisdiction with respect to this file should the parties fail to resolve the matter.

## IX

### **The Unfair Labour Practice Complaint**

The Amalgamated Transit Union, Local 1587, filed a complaint pursuant to section 97 of the Code alleging that the employer, Can-Ar Transit Services, Division of Tokmakjian Limited, violated sections 50, 94 and 96 of the Code. The essence of this complaint was the employer's refusal to recognize the complainant as the bargaining agent for the employees in the bargaining unit and its refusal to bargain with the Union. The Union requested inter alia that the Board order the employer to cease and



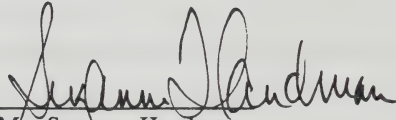
desist from interfering with the Union's representation of employees and order the employer to meet with the Union and commence collective bargaining.

The employer, in its written submissions, stated that it wanted clarification as to the identity of the bargaining representative prior to pursuing collective bargaining in order to avoid multiple negotiations. It considered it to be inappropriate to continue negotiating until the representation issue was resolved. At the hearing, counsel for the employer reaffirmed this position and advised the Board that his client had refused to bargain only because it did not know whom it should bargain with. Counsel also stated that Tokmakjian was prepared to negotiate with whichever bargaining agent the Board declared to be the appropriate representative of the employees concerned.

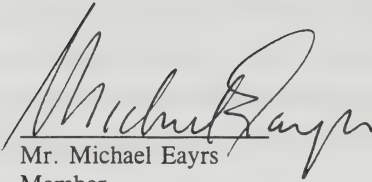
The Union maintained that since bargaining rights persist until they are terminated, the employer was obliged to bargain with the ATU, irrespective of the revocation application. It advised the Board that it no longer sought the remedies contained in its complaint but was simply seeking a declaration that the employer had violated section 50 of the Code.

The Board considered that, in the circumstances of this case, the parties would be better served by a declaration regarding their obligations rather than by a determination of the merits of the complaint. In reaching this conclusion the Board took into consideration its ruling that the ATU retained bargaining agent status, its dismissal of the certification application brought by Can-Ar Transit Operators' Association (1996), its dismissal of the application brought by certain employees for termination of the ATU's bargaining rights, and the undertaking of the employer to negotiate with the bargaining agent declared to represent the employees in question. Accordingly, the Board declared that the employer, Can-Ar Transit Services, Division of Tokmakjian Limited, and the Union, Amalgamated Transit Union, Local 1587, were required to commence bargaining forthwith, in good faith, with the intent of concluding a collective agreement.

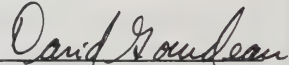
The Board remains seized of this matter bearing file no. 745-5316 and any issues that may arise until all the requirements of the Code have been met.



Ms. Suzanne Handman  
Vice-Chair



Mr. Michael Eayrs  
Member



Mr. David Gourdeau  
Member

# information

Publications

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## Summary

Peter Adams and Delbert Guerin, *employees*, Vancouver Wharves Ltd., *employer*, and Human Resources Development Canada, *interested party*.

Board Files: 950-331; 950-332  
CLRB/CCRT Decision no. 1189  
November 14, 1996

## Résumé

Peter Adams et Delbert Guerin, *employés*, Vancouver Wharves Ltd., *employeur*, et Développement des ressources humaines Canada, *partie intéressée*.

Dossiers du Conseil: 950-331; 950-332  
CLRB/CCRT Décision n° 1189  
le 14 novembre 1996

This case deals with referrals of a safety officer's decisions pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

Two operators of an excavator engaged in unloading rail cars exercised their rights to refuse work based on their belief that broken track on the machine was dangerous to themselves and employees in areas adjacent to the work. The safety officer investigated and issued decisions finding no danger within the meaning of the Code.

The Board heard the two cases together and did not confirm the decisions of the safety officer. It found that there was in fact danger to the employees operating the machine and potential danger to employees in adjacent areas. The Board directed the employer to take remedial actions.

Il s'agit en l'espèce de renvois de décisions d'un agent de sécurité en vertu du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Deux conducteurs d'excavateur affectés au déchargement de wagons ont exercé leur droit de refuser de travailler parce qu'ils croyaient que la voie de roulement brisée comportait un danger tant pour eux-mêmes que pour les employés dans les régions avoisinantes. L'agent de sécurité a mené une enquête et a jugé qu'il n'y avait pas de danger au sens du Code.

Le Conseil a entendu les deux affaires simultanément et n'a pas confirmé les décisions de l'agent de sécurité. Il a jugé qu'il y avait en fait un danger pour les employés qui conduisaient l'excavateur et un danger possible pour les employés dans les régions avoisinantes. Le Conseil a ordonné à l'employeur de prendre des mesures correctives.

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## Reasons for decision

Peter Adams and Delbert Guerin,

*employees,*

*and*

Vancouver Wharves Ltd.,

*employer,*

*and*

Human Resources and Development Canada,

*interested party.*

Board Files: **950-331**

**950-332**

CLRB/CCRT Decision no. **1189**

November 14, 1996

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The Board was composed of Michael Eayrs, sitting as a single Member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). Hearings were held at Vancouver on March 7 and April 4, 1996.

### Appearances

Messrs. Peter Adams and Delbert Guerin, employees, assisted by Mr. Al Lemonnier, Health & Safety Representative and Executive Member, and Mr. Jim Keith, Business Agent - Longshoremen's and Warehousemen's Union, Vancouver, Local 500; Mr. Jim Beynon, Safety Officer, assisted by Ms. Beryl E. Kirk, Labour Program - HRDC;

Mr. Onkar S. Athwal, Manager - Labour Relations, for the British Columbia Maritime Employers' Association; and

Mr. Michael A. McClellan, Superintendent - Industrial Relations, assisted by Mr. Brian Green, for the employer.

These reasons for decision were written by Mr. Michael Eayrs, Member.

## I

These reasons deal with two timely referrals of a safety officer's decisions pursuant to section 129(5) of the Code. The decisions followed consecutive work refusals by two employees at Vancouver Wharves Ltd. (Vancouver Wharves) on February 8, 1996.

The refusals to work were the subject of separate (but virtually identical) decisions by the same safety officer. Both employees cited the same reasons for refusing to work. The Board, with the consent of the parties, heard the two matters together and renders the following decision.

## II

On February 8, 1996, Messrs. Adams and Guerin were assigned to the unloading of copper concentrate from rail cars at Vancouver Wharves. That operation consists in using a tracked mobile excavator which is moved up a ramp to a concrete platform approximately 20 feet above ground. The excavator removes the concentrate from the rail cars and deposits the material onto a grid (known as a grizzly) through which it passes onto a conveyor system. The conveyor transports the concentrate to a storage building some distance from the platform. Two operators rotate every two hours and perform other duties when not operating the excavator.

On the day of the work refusals, Guerin, who worked steadily at Vancouver Wharves and operated the machine in question for several days, worked from 8 a.m. to 10 a.m. At 10 a.m., he was relieved by Adams, an operator and qualified equipment trainer who had been dispatched to the job that day. Guerin, who was aware of broken track pads on the excavator, did not mention them to Adams at that time.

Prior to commencing work, Adams cleaned the excavator and noticed that one track pad and half of another track pad were missing and that several others were cracked. The metal pads in question are made up of sections, each of which is approximately 8 inches by 12 inches.

Adams contacted his foreman by radio, advised him of the situation and stated that he would not operate the excavator in its present condition. He parked the machine and reported to the office where he met with Brian Green, Manager of Concentrate Operations. He reiterated his refusal to operate the machine with missing or cracked pads. Guerin was subsequently asked if he would replace Adams and continue to operate the machine. Guerin refused to do so for the same reasons as Adams.

Following a meeting with representatives of Vancouver Wharves and the International Longshoremen's and Warehousemen's Union, Local 500 (ILWU), Guerin and Adams continued to refuse to work and were assigned other tasks. Safety officer Jim Beynon was called in. Beynon promptly came to the site, met with those involved, conducted his investigation and subsequently rendered a verbal decision of "no danger". The next day he issued his full written reports and decisions which are the subject of the Board's enquiry.

The required parts were ordered following the work refusals and installed the following day. The Board notes in the safety officer's written report (and it was confirmed at the hearing) that Guerin had reported missing and cracked pads four days prior to his refusal to work. No repairs had been carried out as a result of Guerin's earlier report, nor had the required parts been ordered by Vancouver Wharves. This was confirmed in the safety officer's decision pertaining to Guerin's refusal to work.

### III

The relevant parts of the safety officer's written report and decision (with respect to Adam's refusal to work) are almost identical to those applying to Guerin's refusal. They are quoted as follows:

#### "INVESTIGATION BY THE SAFETY OFFICER

##### 1 Statement of the Refusal to Work:

*Mr. Adams stated he is refusing to operate the equipment under the Canada Labour Code, signed registration form at 14:20, February 8, 1996.*

*His concerns were that the four halves of the caterpillar tread pads were broken off and approximately six pads showed cracks.*

*He felt that these represented a danger in a number of ways, eg.:*

- 1. the operator must step down on the tread to vacate equipment and the area of tread with hole (missing pads) could be a danger when operator is getting out of cab.*
- 2. If more pads break off they could be a danger to anyone working below or if it went on conveyor could be a danger to employees in shed.*
- 3. Missing and cracked tread pads could represent a stability problem.*

...

#### III DECISION OF THE SAFETY OFFICER

*On investigating the Right to Refuse of Peter Adams I must go to the definition of danger in 122(1) Canada Labour Code, Part II.*



*'Danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected*

*and to 128(1)*

*Subject to this section, where an employee while at work has reasonable cause to believe that*

*(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or*

*(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or things or to work in that place.*

*The investigations [sic] has to my satisfaction established that*

*1. there is no reason for employees to be in the shed or immediately adjacent to the unloading area while the process is taking place.*

*2. that damaged tread pads can be rotated to enable operator to vacate machine safely.*

*3. the missing pads and cracked pads do not make the equipment unstable or compromise the linked track.*

*Therefore my decision is that there is no danger. "*

#### IV

At its enquiry, the Board heard in considerable detail from all those involved. It became apparent that the excavation of the ore cars calls for a sustained "high production" operation, requiring the full concentration of the operator of the excavator. Further, as opposed to an operation on the ground on soft material, the excavator is subjected to "jarring" movement as it operates from the concrete platform and reaches to remove material from all parts of each ore car. The excavator, when

in operation, is in constant motion, moves several feet back and forth on the platform, and is tilted from side to side as it reaches for the ore in the rail car.

For these reasons, the notion, as suggested by the employer, of removing the danger posed by the missing track pieces by rotating the tracks away from the operator's point of exit, is not, in the opinion of the Board, sufficient to guarantee safe exit for the operator. Although the track might be rotated at the start, the motion during the operation could return the broken sections to an exposed position. The Board heard from and agrees with Adams and Guerin that given the nature of the operation and concentration required, it is possible that injury could be sustained by an operator when descending from the cab of the machine onto broken track.

The potential for danger to employees on the ground was also discussed in detail. There had been a previous incident of a piece of broken track falling from the excavator onto the grizzly. Fortunately, no injury resulted.

Although the investigation stated that no one should have been working in the storage shed or in an area exposed to the danger of being hit by a piece of falling track, it became evident at the hearing that, at times, people were in fact in such areas. It is apparently common practice for an employee, during the operation, to remove excess spillage from the rail cars by using a high pressure hose. It is also common practice for an employee to watch the conveyor system to ensure its operation is not disrupted by excavated material. Further, although access to the storage area and the area adjacent to the conveyor is supposed to be restricted by gates and signage, it is, again, common practice (and human nature) for employees to take short-cuts and ignore or circumvent the somewhat inadequate restrictive access measures in place (or not enforced). The Board was told, and believes, that it is a common occurrence for employees to be in areas where they could be exposed to a falling piece of broken track.

With respect to the stability of the machine as it might be affected by broken or cracked track pads, the Board notes that the excavator, when being operated, is in motion and does tilt from side to side while reaching into the ore car. However, the Board also notes that the excavator is operated from a solid concrete platform and that, even with several missing pads, there is sufficient uncompromised track on the platform to prevent danger from instability.

V

The Board's role with respect to referrals of a safety officer's decision is clearly set out in section 130(1):

*"130(1) Where a decision of a safety officer is referred to the Board pursuant to subsection 129(5), the Board shall, without delay and in a summary way, inquire into the circumstances of the decision and the reasons therefor and may*

*(a) confirm the decision; or*

*(b) give any direction that it considers appropriate in respect of the machine, thing or place in respect of which the decision was made that a safety officer is required or entitled to give under subsection 145(2)."*

Having heard all the evidence and submissions of the parties, the Board cannot confirm the safety officer's decisions in the instant cases.

The Board does find that the condition of the excavator track at the time of the safety officer's investigation did constitute a danger within the meaning of the Code. Accordingly, the Board is required by section 130(1)(b) to give an appropriate direction to Vancouver Wharves.

With respect to the stability of the machine as it might be affected by broken or cracked track pads, the Board notes that the excavator, when being operated, is in motion and does tilt from side to side while reaching into the ore car. However, the Board also notes that the excavator is operated from a solid concrete platform and that, even with several missing pads, there is sufficient uncompromised track on the platform to prevent danger from instability.

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The Board also finds that the relatively unrestricted access to certain areas during the excavation operation is a danger.

The Board notes that the tracks on the machine in question were repaired on the day following the refusals to work. When the requisite parts arrived, the track was repaired in about 45 minutes.

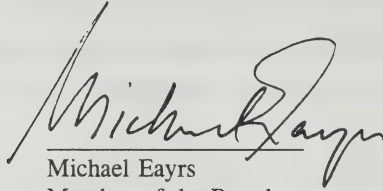
In issuing appropriate directions to the employer pursuant to section 130(1)(b), the Board, in the circumstances of this case, does not see the necessity of imposing detailed and perhaps overly costly remedial measures. It prefers, and believes it proper in these circumstances, to issue directions of a more general nature which will permit practical preventive measures to be taken to correct the danger.

Accordingly, the Board directs the employer to forthwith:

1.       devise and implement a system of regular inspection of the excavator tracks and, should a track or tracks be found defective, to take the machine out of service until the necessary repairs are effected;
2.       ensure, by appropriate signage, lock-out systems and other appropriate measures, that during unloading operations such as those described in this decision, no employees are inadvertently exposed to danger from objects falling from the grizzly or conveyor system.

Finally, to ensure that the foregoing directions are practical and workable, the Board further directs that they be developed and implemented in conjunction with and to the satisfaction of the joint occupational safety and health committee at its Vancouver Wharves operation.

The Board will remain seized of this matter until it is advised that these directions have been complied with.

A handwritten signature in black ink, appearing to read "Michael Eayrs". The signature is written in a cursive style with a large, looping initial "M".

Michael Eayrs  
Member of the Board

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## Summary

Catherine Newsome, *employee*, Canadian National Railway Company, *employer*, and Transport Canada, *interested party*.

Board File: 950-338  
CLRB/CCRT Decision no. 1190  
November 26, 1996

This case deals with a referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health).

A locomotive engineer refused to operate a lead locomotive on an extended run. The locomotive cab was equipped with a type of engineer's seat which, according to the employee, could cause back pain, thus impairing her ability to drive the locomotive in a safe manner.

The safety officer noted that although the seat might be less comfortable than a newer type being installed as part of an upgrading program, there was no restriction in the operating rules against its use. He concluded there was no danger within the meaning of the Code.

The Board confirmed the decision of the safety officer.

## Résumé

Catherine Newsome, *employée*, Compagnie des chemins de fer nationaux du Canada, *employeur*, et Transports Canada, *partie intéressée*.

Dossier du Conseil: 950-338  
CLRB/CCRT Décision n° 1190  
le 26 novembre 1996

Il s'agit en l'espèce d'un renvoi d'une décision d'un agent de sécurité aux termes du paragraphe 129(5) du Code canadien du travail (Partie II - Sécurité et santé au travail).

Une conductrice de locomotive a refusé de conduire une locomotive de tête pour un trajet de longue durée. La cabine de la locomotive était dotée d'un type de siège qui, selon l'employée, pouvait causer des douleurs au dos, ce qui réduisait sa capacité de conduire la locomotive de façon sécuritaire.

L'agent de sécurité a fait remarquer que, bien que le siège soit peut-être moins confortable que les nouveaux sièges qui étaient installés dans le cadre d'un programme d'amélioration, les règles d'exploitation ne contenaient aucune restriction quant à son utilisation. Il a donc conclu qu'il n'y avait pas de danger au sens du Code.

Le Conseil a confirmé la décision de l'agent de sécurité.

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## Reasons for decision

Catherine Newsome,

*employee,*

*and*

Canadian National Railway Company,

*employer,*

*and*

Transport Canada,

*interested party.*

Board File: **950-338**

CLRB/CCRT Decision no. **1190**

November 26, 1996

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The Board was composed of Mr. Michael Eayrs, sitting as a single Member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held at Winnipeg, on October 22, 1996.

### Appearances

Ms. Catherine Newsome, employee, assisted by Mr. Paul Newsome and Mr. Ray Lussier, Local Chairperson, Brotherhood of Locomotive Engineers - CN Rail;  
Mrs. Joanne Wgaboireau and Mr. Derek Wagner, for the Canadian National Railway Company; and  
Mr. Doug Palmerton, Safety Officer, for Transport Canada.

I

The Board's enquiry resulted from the timely referral of a safety officer's decision pursuant to section 129(5) of the Code.

*"129(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

The request for referral of safety officer Palmerton's decision was made by Ms. Catherine Newsome, a locomotive engineer employed by the Canadian National Railway Company (CN Rail). Moreover, the referral was made following Ms. Newsome's continued refusal to work and Mr. Palmerton's decision that no danger, pursuant to section 128(2) of the Code, existed.

II

Here are the circumstances giving rise to Ms. Newsome's refusal to work and the safety officer's decision in question.

On May 17, 1996, Ms. Newsome, an experienced locomotive engineer, reported to CN Rail's Symington Yard at its Winnipeg terminal. She was assigned to operate lead locomotive no. 5128 to take a train from the Symington Yard to Melville, Saskatchewan. The trip was an "extended run" of at least 10 hours. Ms. Newsome examined the cab of the locomotive and noted that it was equipped with an "old style" engineer seat. She advised CN Rail that she required a locomotive equipped with a

newer seat (known as a Baulter seat) or, alternatively, that the seat in the assigned locomotive should be replaced accordingly. CN Rail advised her that it was unable to accommodate either request.

Ms. Newsome then invoked her right, pursuant to the Code, to refuse to perform the work assigned. She refused because, although rested and medically fit for the work assigned, due to a previous back injury and ensuing medical problems, the design of the seat was such that she could not occupy it for the duration of the trip without incurring "undue aggravation" to her back. That, she claimed, could impair her ability to operate safely the locomotive for the full run.

### III

Following Ms. Newsome's refusal to work pursuant to section 128(1) of the Code, Mr. Doug Palmerton, safety officer, accompanied by Mr. Lance Smith, Equipment Officer, Transport Canada, arrived and conducted an investigation. The safety officer's report and decision are part of the Board's file and provide full details of a thorough investigation. Most of the relevant findings in his report were not disputed at the hearing and may be summarized as follows.

- Locomotive 5128 and other locomotives in the same series have been in service as control cabs, with the same seating, for a number of years. At the time of the investigation, 490 cabs of the 713 locomotives in the series had been modified, in conjunction with the CN "Cab Committee," to include improved seating. The upgrading of the series is scheduled for completion in May 1997.

- There are no Canadian Rail Operating Rules (CROR) restricting the use of locomotives with unmodified cabs as lead locomotives. It is however CN Rail policy to use lead locomotives with modified cabs whenever possible.

- The investigation included an examination of the locomotive seat and no defects were found. Ms. Newsome was observed sitting in the seat and was found to have good visibility and access to controls. When asked if she thought the seat would be a cause of danger if the safety officer was to occupy it for the same run, Ms. Newsome responded that "probably you would not be affected the same as I would because of my previous back problems."

- The report also indicated that the conductor assigned on the day in question had completed his conductor's locomotive operator training; had made 26 trips on the extended territory; had handled the train on about 10 trips for about half their duration and expected to relieve Ms. Newsome, if requested, on the tour of duty in question.

With respect to this latter point, the Board asked Ms. Newsome if she would have let the conductor relieve her for a significant portion of the extended run. She replied, and it was corroborated by CN Rail and the safety officer, that it was solely at the discretion of the engineer in charge of the locomotive, when and if the controls would be turned over to the conductor. Ms. Newsome also explained that, as a locomotive engineer, she personally operated the locomotive for the full duration of her trips with the minor exception of very short "stretch breaks."

Mr. Palmerton concluded his report by confirming his verbal finding, on the date of the refusal, of "absence of danger."

#### IV

At the hearing, Mr. Paul Newsome, acting on Ms. Catherine Newsome's behalf, submitted to the Board and the parties a comprehensive written presentation. In that presentation, he argued, in essence, that fatigue and discomfort resulting from inadequate locomotive cab conditions and poor seating could result in decreased concentration on the part of the locomotive engineer. This, according to



Mr. Newsome, could increase the possibility of an accident occurring during the course of the train's run. With respect to the Board's consistent reference to the definition of danger as defined in section 122(1) and the notion that danger must be "immediate and real," Mr. Newsome drew an analogy between the discovery of a cracked axle, which would result in a finding of danger, and poor seating. He argued that there was essentially no difference between the potential danger of a cracked axle breaking during a train run and the potential danger of seating discomfort which could result in distraction of the locomotive engineer. Both situations should, in his opinion, be viewed as dangerous within the meaning of the Code.

Both CN Rail and the safety officer refuted this argument. It was pointed out to the Board that the CROR contain no restrictions with respect to locomotive cabs. However, in the case of a cracked axle, in the example put forward by Mr. Newsome, it would be against the rules to permit the train to proceed. CN Rail also reiterated its policy of assigning lead locomotives with improved seating whenever possible.

With respect to the analogy between a cracked axle, for example, and uncomfortable seating, the Board agrees with CN Rail and the safety officer. A cracked axle should be viewed as an immediate danger within the meaning of the Code and not, as proposed by Mr. Newsome, as a potential danger.

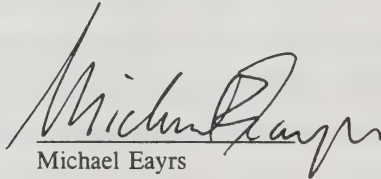
## V

The matter of locomotive cabs and locomotive seating is not new to this Board. See, for example, Terence J. Grams (1994), 95 di 29 (CLRB no. 1079). In that case, Mr. Grams, a trainman who had suffered a previous back injury, invoked his right to refuse to work on a "through run" of up to 10 hours. Mr. Grams noticed a slight wobble in the seat he was to occupy and anticipated back problems if he had to fulfil his tour of duty occupying the seat in its present condition. The safety officer had conducted a full investigation and decided that no danger, within the meaning of the

Code, existed. This same panel of the Board confirmed the safety officer's decision. (See also Terry G. Jorgenson (1995), 98 di 121 (CRLB no. 1128).)

In the instant case, the Board can understand Ms. Newsome's concerns and, given her particular circumstances, her reluctance to operate the locomotive to which she was assigned on May 17, 1996.

However, having reviewed the safety officer's decision and all the parties' submissions, the Board finds that the condition of the seat on locomotive 5128 was not such that a danger, within the meaning of the Code, existed. Accordingly, the Board confirms the safety officer's decision.



Michael Eayrs  
Member of the Board

# information

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## Summary

Teamsters Local Union No. 31, *complainant*,  
and Can-Am West Carriers Inc., *respondent*.

Board Files: 745-5153  
745-5200

CLRB/CCRT Decision no. 1191  
December 2, 1996

The union alleged that the employer violated sections 24(4), 94(1)(a), 94(3)(a), 94(3)(b), 94(3)(e) and 96 of the Canada Labour Code by transferring, laying off and discriminating against employees believed by the employer to be union supporters or altering their terms or conditions of employment and by generally intimidating and coercing its employees in order to compel them to refrain from becoming or to cease being members of the union during an organizing campaign at the employer's place of business.

The Board reviewed the conduct of the employer generally and specifically with respect to five individual employees, all of whom had attended a union meeting to the knowledge of the employer and all of whom had been subsequently disciplined or laid off. In each instance, it found that the employer had violated sections 94(3)(a) and 94(3)(e) of the Code as its actions were motivated by anti-union animus. In addition, the employer in this case wittingly set out to frustrate the unionization campaign by any means at its

## Résumé

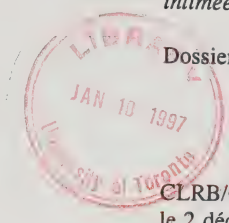
Section locale 31 du syndicat des Teamsters, *plaignante*, et Can-Am West Carriers, Inc., *intimée*.

Dossiers du Conseil: 745-5153  
745-5200

CLRB/CCRT Décision n° 1191  
le 2 décembre 1996

Le syndicat allègue que l'employeur a enfreint le paragraphe 24(4), les alinéas 94(1)a), 94(3)a), 94(3)b) et 94(3)e) ainsi que l'article 96 du Code canadien du travail en transférant ou mettant à pied des employés qui selon l'employeur étaient des partisans syndicaux, en exerçant de la discrimination à leur égard ou en modifiant leurs conditions d'emploi, et en général en usant d'intimidation et de coercition à l'égard de ses employés afin de les obliger à s'abstenir ou à cesser d'adhérer au syndicat pendant une campagne de syndicalisation dans ses établissements.

Le Conseil a examiné le comportement de l'employeur en général et de cinq individus en particulier. Ces personnes avaient assisté à une réunion du syndicat, au su de l'employeur, et avaient par la suite fait l'objet de mesures disciplinaires ou avaient été mises à pied. Dans chacun des cas, le Conseil a jugé que l'employeur avait enfreint les alinéas 94(3)a) et 94(3)e) du Code puisque son comportement était motivé par un sentiment antisyndical. En outre, l'employeur avait, en toute connaissance de cause, tenté de mettre la



disposal and therefore violated sections 94(1)(a) and 96 of the Code. Finally, the employer's transfer of equipment and personnel to another location shortly after the union meeting constituted a breach of section 24(4) of the Code.

The Board ordered that the employees be made offers of reinstatement and compensation based on the work presently available and on their level of seniority relative to current employees.

campagne de syndicalisation en échec par tous les moyens à sa disposition et avait donc enfreint l'alinéa 94(1)a) et l'article 96 du Code. Enfin, le transfert de matériel et de personnel à un autre endroit peu après la réunion du syndicat constituait une violation du paragraphe 24(4) du Code.

Le Conseil a ordonné à l'employeur de faire une offre de réintégration et de dédommagement aux employés visés en tenant compte du travail existant et du niveau d'ancienneté des employés.

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## Reasons for decision

Teamsters Local Union No. 31,

*complainant,*

*and*

Can-Am West Carriers Inc.,

*respondent.*

Board Files: 745-5153  
745-5200

CLRB/CCRT Decision no. 1191  
December 2, 1996

---

The Board consisted of Mr. J. Philippe Morneau, Vice-Chairman, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A hearing was held January 22 to 25, 1996 at Kelowna, British Columbia.

### Appearances

Mr. Greg Francis, assisted by Mr. Lyle Kent, organizer, and Mr. Tracey Pringle, truck driver, for the complainant; and

Mr. Greg Anctil, assisted by Mr. Ray Shaw, general manager, for the respondent.

### I

On August 15, 1995, the Teamsters Local Union No. 31 (the union or the complainant) filed a complaint pursuant to section 97(1)(a) of the Code alleging that Can-Am Carriers Inc. (the employer, the company or the respondent) had violated sections 24(4), 94(1)(a), 94(3)(a), 94(3)(b), 94(3)(e) and 96 of the Code by transferring, laying off, and/or discriminating against employees believed by the employer to be union supporters, or altering their terms or conditions of employment,

and by generally intimidating and coercing its employees in order to compel them to refrain from becoming or to cease being members of the union during an organizing campaign at the employer's place of business (file 745-5153).

On October 13, 1995, the union filed a further complaint alleging violations of the same articles and a new series of facts (file 745-5200).

## II

The evidence produced was extensive and often disputed by both parties. The Board's presentation of the facts in this case represents the facts that were established to its satisfaction and that are material to its conclusions.

The material facts are summarized as follows:

### **Generally**

The employer is a trucking company whose main office is in Abbotsford, B.C., with a branch office in Kelowna, B.C. Its business almost exclusively consists in transporting goods between Canada and the United States. The company operates flatbeds, vans, tankers and bulk-grain carriers. At the time of the events alleged in these complaints, the bulk-grain operations constituted a relatively small amount of the company's revenues.

At the Kelowna branch, bulk-grain shipments depended upon contracts with one supplier. Due to a shortage of shipments through Kelowna beginning in June 1995, the volume of grain needed to be hauled was reduced dramatically. The employer received a letter from its supplier, James Richardson & Sons, Limited, on June 1, 1995 advising it of an impending shortage of grain to be shipped out of Kelowna, but also, of an increase of grain to be shipped out of Vancouver. On June 9, the employer received a second letter from its supplier advising it that the grain to be shipped out of Vancouver would not materialize as planned.

While the employer could expect shortages of grain shipments in the near future, as of June 9, 1995, these shortages had not yet occurred and the average number of railroad cars of grain, approximately 14 to 16 per week, was still coming into Kelowna. By January 1996, there was one truck hauling bulk grain out of Kelowna whereas there were previously as many as 11 drivers regularly hauling bulk from that location.

In late May and early June 1995, it was clear to the employer that it was not on good terms with its drivers. Rumours were rife of an impending union meeting.

In the week leading up to this meeting, which was held on June 3, 1995, the atmosphere was very tense. Brian Krebs, bulk manager and dispatcher, indicated that there was trouble coming. Daniel Forsyth, vice-president of the company, informed driver Doug Kapalka that he did not like the rumours he had been hearing about a planned union meeting. When Kapalka responded that the company should listen to driver concerns, Forsyth responded in turn that Kapalka should keep his advice to himself and that the employer would look after its own affairs as it saw fit ("you do what you have to do, we'll do what we have to do").

Earlier in the week, Krebs had told driver and mechanic's helper Tracey Pringle that there would be a union meeting Saturday. He also said to Pringle that if the union got in, there would be no jobs.

The company, aware of the impending union meeting as early as Tuesday, set out to disrupt it and discourage unionization of its work-force. Rumours circulated that the meeting had been cancelled.

On Friday, June 2, 1995, Doug Morris, a driver, met with Ray Shaw, personnel manager, and Terry MacGillivray, operations supervisor and dispatcher, in a café up the road from the employer's place of business. The meeting was initiated by

management. At the meeting, Morris was given a list of drivers to contact in order to convince them not to join the union. MacGillivray asked Morris to contact him when he had the information and wrote his home phone number and cellular phone number on the top of the sheet. Morris was told that what they were doing was illegal and should be kept confidential.

Also on Friday June 2, Tracey Pringle installed CB radios in the pick-up trucks of Brian Krebs and Terry MacGillivray.

The meeting of some of the company's drivers and Teamsters organizers Lyle Kent and Gene Wirch took place on the morning of Saturday, June 3, 1995 at the home of owner-operator Phil Simpson. Drivers present at the meeting included Doug Kapalka, Denny Proulx, Ken Rollins, Kim Peters, Doug Morris, Jim Stobbe, Greg Kapinchsky and Tracey Pringle. At the meeting, Kapalka sat in front with the organizers and made a speech exhorting his co-workers to join the union. Doug Kapalka, Denny Proulx and Tracey Pringle signed membership cards. Subsequently, on the same day, Paul Donovan and Robert Simpson also signed cards.

Three drivers walked out of the meeting, Greg Kapinchsky, Kim Peters and Jim Stobbe.

On the next day, June 6, 1995, the union filed an application for certification for a unit of bulk-haul drivers employed by the employer in and out of its Kelowna branch (file 555-3917). On December 29, 1995, having considered that the unit sought was not appropriate for collective bargaining, the Board rejected the union's application for certification.



## **Doug Kapalka**

Doug Kapalka attended at the employer's place of business on Sunday, June 4, 1995 and put his briefcase in the cab of his truck as was his habit. He then returned home. Krebs phoned Kapalka three times that day before his departure. Krebs asked about the time of his departure. The third time he called, Krebs said jokingly that he was concerned because his son would be on the road at the same time in a pick-up truck and "he didn't want Kapalka to run over him."

On arriving at the operations yard later that day, Kapalka found that the lights of the truck had been sabotaged. He called fellow driver Robert MacDonald at home who joined him to help him repair the lights and check the rest of the truck for damage. While waiting, Kapalka had called the head mechanic who advised him to take the light cord from another truck.

Paul Donovan, Phil Simpson, Robert MacDonald and Doug Kapalka drove to the border that night. Krebs followed in his pick-up truck and was spotted when the drivers stopped at the Kaleden scales. Shaw and MacGillivray were also on the road.

Both Simpson and Kapalka had paperwork problems. Simpson's paperwork came from the employer. Kapalka's waiver was in his truck unattended while the company had care and control of the vehicle.

When Kapalka could not find his waiver (which he needed to cross the border to the U.S.), he called Krebs on the phone. Krebs told him in an abusive manner to look again. Kapalka did so without success and called Krebs back. Krebs was angry and, using foul language, called Kapalka names and ordered him to cross the border without his paper. Kapalka refused because his future livelihood was at stake. The conversation became heated with Krebs repeatedly telling Kapalka to "shut up" and Kapalka replying "Don't tell me to shut up." Finally, Kapalka ended the conversation

with words to the effect that he and Krebs would one day have to settle their differences "like men."

Kapalka and Simpson turned their trucks around and proceeded to a local truck stop. After once more talking with Krebs, they waited for Shaw and MacGillivray. When Shaw and MacGillivray arrived, they fixed Simpson's paperwork problem. Kapalka's paper could not be located, however, and he could not cross. Shaw drove Kapalka's truck back to Kelowna as Kapalka, in a distressed state, was unable to continue. Kapalka's wife came to pick him up.

The following morning Kapalka went to his family doctor who prescribed him a week off work. Kapalka then went to the company's premises in Kelowna. Upon entering the office, Kapalka said in colourful language that he resented what had transpired that night and that someone should put the employer's house in order. When his request for immediate leave was refused, he presented Shaw with the doctor's note. After having reviewed the note, Shaw advised Kapalka that in any event he was laid off because he could not cross the border. Kapalka then said that he could get a new waiver on short notice. When he left the office, he was under the impression that he was on medical leave.

While at home, Kapalka received a call from one of the drivers who informed him that Krebs was telling people that he had fired Kapalka. Kapalka called the company to find out about his status. Kapalka spoke with MacGillivray at the end of the day. MacGillivray informed him that he had been laid off as of 1:00 p.m. and that as of now he was fired for threatening a company officer. Kapalka asked who he was supposed to have threatened, MacGillivray replied that he did not know.

On June 6, 1995, Kapalka went to the employer's premises to retrieve his personal belongings. When he saw Krebs and MacGillivray, he told Krebs that when the union got in, he and his family would be finished. Kapalka then went to the drivers' room

where he was approached by MacGillivray who explained to him that the company was not willing to accept unionization of its work-force by the Teamsters.

### **Denny Proulx**

On June 2, 1995, Denny Proulx picked up a load from a third company. An employee of that company told him that the load did not have to be in Denver until June 6, 1995. He called his employer because he had been told that the load had to be there by June 5, 1995 but could reach no one. He attended the June 3, 1995 meeting. He returned to the company yard at 11:00 p.m. on June 3, 1995 to pick up his load and go to Denver and found that his truck was gone.

On Saturday June 3, Jim Stobbe, at the employer's request, went and got Denny Proulx's truck at 7:30 p.m. and left the yard with it at 8:30 p.m.

When Proulx called MacGillivray the next morning to enquire where his truck was, MacGillivray said to him "I know you were at the union meeting, I know you signed a card." There was no mention of disciplining Proulx. Nonetheless, management decided to fire Proulx without getting his side of the story. Proulx was tersely informed of the fact when he called the employer later in the week.

### **Tracey Pringle**

Tracey Pringle went to a prearranged doctor's appointment on the morning of June 3. He went to the union meeting on his lunch hour, arriving at approximately 12:45.

During the meeting, Krebs called to speak to Pringle. Pringle was given the phone and was told "Management knows you're there. We want you back at the shop right now."

After Krebs' phone call, Pringle returned to the shop where he was confronted by Krebs and MacGillivray. MacGillivray asked him if he had signed a union card, which he at first denied. MacGillivray responded that management knew he had signed a union card and that he would be terminated for so doing. To save his job, Pringle agreed to go back and try to get his union card, which he did. He brought the card back to MacGillivray who instructed him to tear it up.

MacGillivray informed Pringle that he was suspended for two days. Pringle did not work the next day, Sunday, June 4, 1995, but was asked to haul Kapalka's load on Monday, June 5. During this trip, he injured himself and was on worker's compensation for a month.

When Pringle returned to work on July 4, he was told that he could no longer work as a mechanic's helper as the employer's operations had been downsized and he was not one of the employees who had been retained as the employer was only keeping the mechanics. If he wanted to continue working for the employer, the only work available would be long-haul flatbed work out of Abbotsford, requiring absences of up to 10 days or more.

Pringle refused this work because he did not want to leave Kelowna for personal reasons and because he had no experience loading or operating flatbeds. Shaw mentioned the possibility of more bulk work coming. Pringle agreed to be laid off in the meantime and signed a form saying that he had requested the lay-off. He has not been called back since.

Subsequent to his formal lay-off, Tracey Pringle found out that Terry Trahan, his fellow mechanic's helper, had been given bulk work and even put back in the mechanic's shop and on dispatch. Pringle believed that this constituted preferential treatment as Trahan was the last one hired. At that point, he contacted the union, which filed a complaint with this Board.



### **Robert Simpson**

On the morning of June 3, Robert Simpson arrived in the yard and was questioned by Terry MacGillivray as to whether Simpson planned to go to the union meeting. MacGillivray was frank with Simpson, telling him that if the union got in, the Kelowna operation would shut down.

On June 6, 1995, Brian Krebs told Robert Simpson that he was to meet with Ray Shaw on June 7, 1995 at 9:00 a.m. At some point during the week of June 5, 1995, Robert Simpson was approached by Terry MacGillivray who told him that he could not figure out how he and Doug Morris had voted. Simpson replied that it made no difference to him whether the union got in or not.

On June 7, 1995, Simpson met with Shaw and MacGillivray. On Simpson's consent this meeting was recorded. He was told that he had to accept a transfer to Abbotsford or be laid off. The drivers who were to remain in Kelowna had already been selected and, despite his seniority, he was not one of them. Simpson chose lay-off rather than transfer to Abbotsford. He was not overly concerned about operating flatbeds. He has since learned of "junior" employees who continue to work out of Kelowna. Notably, he personally observed that the tractor which was assigned to him, the number 509, was still in service after his lay-off. Simpson agrees that the employer recalled him for temporary bulk work in July. However, he was not available at that time as he was looking for work in Alberta. When he returned the employer's call, the bulk work had been completed.

### **Paul Donovan**

On the morning of June 3, 1995, upon Donovan's return from the meeting, Donovan saw MacGillivray standing in front of the building speaking with other employees. MacGillivray asked him if he was going over to vote. Donovan said jokingly that it

was too late, that he had already gone to the meeting and voted. MacGillivray responded that he had personally saved Donovan's job, that Donovan had kids and that if he had voted yes, he had better go back and rip up his card.

Donovan was fired on June 9, 1995 for allegedly breaking a spring on a truck on May 26, 1995. Nothing was said to him about this until June 9, 1995. On June 5, Paul Donovan was told by Ray Shaw that he could either move to Abbotsford or be laid off. He was given until the end of the week to make up his mind. When he saw Ray Shaw on Friday June 9, 1995 to inform him that he would accept the transfer to Abbotsford, Shaw showed him an inspection report that apparently indicated he had failed to mention that there was a broken spring on a trailer he had been pulling. No attempt was made to get his version of the facts and he was summarily dismissed.

### III

The legal principles that apply to allegations of unfair labour practice under section 94 are well established. The Board had occasion recently in Atomic Transportation System Inc. (1995), 99 di 43 (CLRB no. 1136), to review them:

*"In cases of alleged violation of section 94(3), section 98(4) of the Code reverses the burden of proof:*

*'98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.'*

*Consequently, the Board most frequently will rely on circumstantial evidence to decide if there exists anti-union animus:*

*'The Board has, on several occasions, held that an employer could dismiss an employee and that such a dismissal would not necessarily*

*contravene the Canada Labour Code, section 184(3)(a) in particular, if the employer was not motivated by anti-union animus. When considering the employer's animus, we must examine its overall behaviour and conclude on the basis of circumstantial elements, since it is well-known that no employer will acknowledge that it was motivated by anti-union animus. ...'*

*(Purolator Courier Limited (1982), 48 di 32 (CLRB no. 365), page 54; see also Emery Worldwide (1990), 79 di 150 (CLRB no. 775))*

*It is most important to remember, however, that it is not the Board's task to determine the propriety of the dismissal in terms of 'just cause,' or to stand in the place of a rights arbitrator in respect of a dismissal:*

*'It is only natural for an employer to submit evidence of cause or just cause when faced with a complaint of unfair practices surrounding the dismissal of an employee, or failure to recall an employee which amounts to a failure to continue to employ that employee. The Board will hear this evidence not to rule on it but, we repeat, to make sure, in the exercise of its mandate, that this cause alleged by the employer is not associated with anti-union discrimination.*

*In other words, the Board is fully aware, and has stated this several times, that it does not have jurisdiction to determine rights disputes (within the meaning of labour relations) which can arise between parties when an employee has been dismissed whether there was just cause, cause or even no cause.'*

*(Verreault Navigation Inc. (1978), 24 di 227 (CLRB no. 134), page 288)*

*This means that the onus on the employer is not necessarily to demonstrate that it had just cause to dismiss Mr. Hildebrant, but that in taking the actions it took, whether they were right or wrong from a dismissal standpoint, such actions were not taken with any anti-union animus.*

*On this latter point, the cases are clear that any anti-union animus is enough to taint the actions of the employer. The applicable test is described extensively in National Pagette (1991), 85 di 1 (CLRB no. 862):*

*'When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the Code, the employer must show that its reasons for dismissing an employee are in no way motivated by anti-union animus. Past Board decisions dealing with this subject are as abundant as they are unequivocal. It is appropriate to quote in extenso the following excerpt from Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600):*

*"The law on the subject of discrimination against employees for having exercised rights under the Code is well settled. If a decision by an employer to take any of the actions described in section 184(3)(a) against an employee has been influenced in any way by the fact that the employee has or is about to exercise rights under the Code, then the employer's actions will be found to be contrary to the Code. Anti-union motives need only be a proximate cause for an employer's conduct to run afoul of the Code:*

*'... It is a rare experience for labour relations boards to hear an employer who cannot advance a justification for his act - e.g. failure to report to work one day, an act of insubordination to a superior, or merely a re-evaluation of the employee's performance which showed he did not maintain the standard desired. They may be proper motivations for employer actions but experience shows they are often relied upon around the time the employee is seeking to exercise or has exercised his right under section 110(1). To give substance to the policy of the legislation and properly protect the employee's right, an employer must not be permitted to achieve a discriminatory objective because he coupled his discriminatory motive with other non-discriminatory reasons for his act.*

*For these reasons, if an employer acts out of anti-union animus, even if it is an incidental reason, and his act is contemplated by section 184(3), he will be found to have committed an unfair labour practice.'*

*(Yellowknife District Hospital Society et al. (1977), 20 di 281; and 77 CLLC 16,083 (CLRB no. 82), pages 284-285; and 461; emphasis added)"*



(pages 34-35; and 14,007; emphasis added)

*In addition to this decision, see also Larose-Paquette Autobus Inc. (1990), 83 di 175 (CLRB no. 840), for other relevant references.*

*The framework for examining evidence presented by either party is therefore clear. The central question to be answered here is whether, based on the documentary and oral evidence, the reasons stated by the employer in its dismissal memo to Louise Arbour are absolutely the only reasons that entered into its decision, notwithstanding the question of whether they are, otherwise, legitimate and valid."*

(pages 9-10; emphasis added)

*See also Transport Papineau Inc. (1990), 83 di 185 (CLRB no. 842), where the Board discussed the concept of pretext versus real cause:*

*'When examining the merits of a complaint of unfair labour practice, the Board must be satisfied that the employer has not taken actions to limit or impede the legitimate exercise by employees of the rights conferred by the Code. The employer's actions must not be motivated by anti-union animus, but must be for cause. This does not mean, however, that it is up to the Board to determine whether the reasons given by the employer to justify the action are valid, fair and commensurate with the seriousness of the alleged offence. The Board has no authority to determine whether the penalty imposed is commensurate with the alleged offence (see Services Ménagers Roy Ltée (1981), 43 di 212 (CLRB no. 308); and Pierre Fiset (1985), 55 di 233; and 85 CLLC 14,041 (CLRB no. 473)).*

*The Board, however, can examine the nature of the cause alleged by the employer, not to assess its fairness or determine its validity having regard to the context in which it is alleged, but to determine whether it has the appearance of a pretext. This approach enables the Board to satisfy itself that this is indeed the real reason for the penalty and not an excuse or a pretext that masks anti-union animus. ...'*

(page 190; emphasis added)"

(pages 44-47; emphasis added)

In another recent case, the Board further elaborated on the burden of proof the employer had to meet in order to rebut the presumption against it:

*"Although, as indicated, the employer's reasons for its refusal appear reasonable enough, they must be weighed against its conduct viewed in the entire context of the organizing drive. From the inception of the organizing campaign, the employer's conduct has been rife with anti-union animus as other parts of this decision disclose. We are therefore justifiably circumspect in assessing its motives. As the Board stated in Gardewine and Sons Limited (1981), 45 di 124; and 81 CLLC 16,135 (CLRB no. 328):*

*'Any alleged improper employer action which coincides with union activity and in particular organizational campaigns, will be scrutinized very closely by the Board. Not only must they come before the Board with "clean hands", they must be "squeaky clean". The least inference that actions by any employer are designed to counteract or have been in any way motivated or affected by employees having opted to exercise their rights under the Code to participate in collective bargaining, will result in a finding of a violation and appropriate remedial steps shall be taken.'*

*(pages 130; and 907)*

*As the Board further observed in that case:*

*'... Our experience shows that employers who have taken genuine actions which have unfortunately or unavoidably coincided with union activity have little or no problem discharging the onus under section 188(3) by relying on the merits of those actions. In fact, well-intentioned trade unions seldom bring such matters to the Board after evaluating the circumstances.'*

*(pages 131; and 907)*

*Weighing all the evidence, the Board must decide at the conclusion of the case, whether in the circumstances, the employer met the burden imposed upon it. Where the employer is unable, on balance, to prove that anti-union animus had no role to play in its impugned decision, it will not have met the onus imposed upon it by section 98(4) of the Code. This is so, even if the Board is simply unable to decide, as here, which version - the union's or the employer's - to accept. In such a case, the argument of the employer, being the*

*party with whom the burden of proof rests, must fail. In Carbec Inc. (1985), 62 di 127 (CLRB no. 528), the Board emphasized:*

*'In the final analysis, the complaint hinges on this conversation and, as counsel for the employer acknowledged, it is essentially a matter of weighing the testimony. Were the Board to accept Malouin's version, then clearly this statement evokes both disciplinary considerations and anti-union animus, and the consequences for the employer are clear. If, however, we accept Sirard's version, the consequences will obviously be different. After weighing this testimony, the Board is still unable to decide which of these two versions it should accept. However, it must decide. Consequently, having regard to the evidence as a whole, the Board concludes that the argument of the party with whom the burden of proof rested must fail. The Code is clear: the onus of proof is on the employer. The employer's argument must therefore fail because it did not discharge this burden. Accordingly, the complaint is allowed.'*

*(page 134)"*

*(Echo Bay Mines Ltd. (1996), as yet unreported CLRB decision no. 1179, pages 29-30)*

Violations of sections 24(4), 96 and 94(1)(a) have also been alleged by the union. On the facts of the present case, the protection given by these sections and the protection given by section 94(3) overlap. It is important to point out, however, that the union bears the burden of proof in respect of its allegations under these sections, but that it does not have to demonstrate that anti-union animus was present in order to establish a violation.

#### IV

In general, there was overwhelming evidence of anti-union animus on the part of the employer and the Board has little difficulty in making this finding. Two examples warrant mention.

Firstly, the surveillance of employees during the drive to the border on the night of June 4, 1995, the day following the union meeting, can only be explained as a blatant attempt to catch employees misbehaving in order to terminate or otherwise discipline them. The Board simply does not believe the employer's explanation of this incident. In addition to the bizarre nature of the events that transpired on the night of June 4 and the employer's unlikely rationale, the Board notes that according to uncontradicted evidence, CB radios were installed on the Friday, June 2 preceding the meeting, whereas the employer's evidence was clear that the orders based on the so-called rumours of trucks being abandoned at the border were given on June 4. No credible explanation was ever given for the sudden need for the CB radios.

Secondly, the employer's phone call to Tracey Pringle at the union meeting was a clear attempt to demonstrate to its employees that it knew of the union activities and that it would oppose them to the point of harassing the employees at a private residence outside working hours. The employer's explanation for this phone call is not credible. Pringle recalled that MacGillivray had asked him in the morning if he knew where Proulx was and further testified that he had mentioned to Proulx that MacGillivray was looking for him. The Board finds Pringle's evidence credible. MacGillivray, on the other hand, is simply not to be believed when he states that, suddenly, around the time the meeting was taking place and, according to the most likely chronology, immediately after some drivers had left the meeting without signing cards, he noticed that Proulx's truck was still in the yard and thought to contact Pringle at a union meeting in order to find Proulx. The Board likewise accepts Pringle's testimony concerning the circumstances leading to his attendance at the meeting and rejects the employer's evidence concerning the "bargain" offered by Pringle. The Board finds that the employer's explanation was concocted in order to explain the phone call to Phil Simpson's house during the union meeting.

These two elements, coupled with the numerous anti-union statements and threats which the Board finds were made by the employer and its representatives, most



notably by Terry MacGillivray, are sufficient to convince the Board that upon learning of the attempt to unionize its work-force, the employer wittingly set out to frustrate this campaign by any means at its disposal. The Board thus finds that the employer has not rebutted the presumption against it that section 94(3)(e) has been violated. Moreover, the Board is satisfied on the balance of probabilities that the employer's actions violated sections 94(1)(a) and 96 of the Code.

Likewise, the employer has not rebutted to the Board's satisfaction the presumption that it knew who, among its employees, had signed a union card. The Board is satisfied that the employer was able to identify those individuals who were at the union meeting. According to evidence in chief of Terry MacGillivray, for example, Tracey Pringle told him who was at the meeting and that "some people left." While MacGillivray did not say that Pringle indicated who were union supporters as well as where and when the meeting was being held, we find it very difficult to believe that those who had attended and those who had signed were not identified. The pattern of terminations and lay-offs also points clearly to employer knowledge of which individuals had signed a union card. Proulx and Kapalka were both dismissed on June 5 for disciplinary reasons. Donovan and Simpson, however, who arrived after the meeting had broken up and after Pringle and those individuals who did not sign union cards had left, were treated normally by the employer until June 9. Finally, the evidence of Doug Morris concerning the meeting that took place with Terry MacGillivray and Ray Shaw is proof of the employer's intention to systematically identify the union supporters in its ranks.

In the Board's opinion, moreover, anti-union animus was a proximate cause in the terminations and lay-offs complained of here.

### **Doug Kapalka**

Doug Kapalka, with Doug Morris, was the chief supporter of the organizing drive. The Board is satisfied that the employer's surveillance on the night of June 4 specifically sought to monitor Kapalka, among others, in order to find a union-related pretext to get rid of him. In the circumstances, the Board need not weigh Kapalka's credibility against that of the management with respect to the content of conversations between Kapalka and Krebs or to determine, assuming Krebs' testimony to be accurate, whether Kapalka's punishment was deserved.

The Board therefore concludes that the termination of Doug Kapalka violated section 94(3)(a)(i) of the Code.

### **Denny Proulx**

The testimony of Denny Proulx and of management was very different. Much debate centred on when, precisely, Jim Stobbe left for Denver. In this regard, the Board accepts that Stobbe was in Loveland, Colorado, just north of Denver, at some time on June 6. However, the Board notes that the employer was unable to provide evidence that did not emanate directly from itself or from Stobbe that documented any stops prior to the stop in Loveland. In the circumstances, given that the estimated driving time from Kelowna to Denver is approximately 26 hours, the employer has not satisfied the Board that Stobbe left for Denver on the night of June 3. Had he left at this time, it seems clear that he could easily have arrived in Denver on Monday if the matter was indeed urgent as the employer has suggested.

The Board does not accept the employer's evidence that the load had to be in Denver on Monday. In this light, the Board finds that Proulx's dismissal for failing to follow dispatcher's orders was a pretext designed to get rid of him for his union activity.

Moreover, even if the Board had found that the load had to be in Denver on Monday, the uncharacteristic brusqueness and timing of Proulx's termination as well as the disproportionate nature of the penalty imposed would nonetheless have led it to the same conclusion.

The Board therefore concludes that the termination of Denny Proulx violated section 94(3)(a)(i) of the Code.

### **Paul Donovan**

While Paul Donovan's difficulties with the employer had been documented, the Board does not accept that his termination was a direct result of these violations.

The Board notes that the incidents of May 27 were not acted upon until June 9, 1995. In the interim, Donovan had been offered a transfer to Abbotsford on June 5. Donovan was thus allowed to drive from May 27 to June 9, while what was a supposedly serious safety violation sat in Shaw's basket. It was only when Donovan indicated that he would accept the transfer that the memo was brought out.

Donovan's termination is also to be contrasted with the fact that a much more serious omission earlier in the year - whereas Donovan was just as clearly "on probation" - did not bring about termination, but concentrated efforts at rehabilitation from the part of management. After Donovan had signed a union card, however, a relatively minor violation brought summary dismissal without any attempt to even hear Donovan's side of the story.

For all the above reasons, the Board concludes that the termination of Paul Donovan violated section 94(3)(a)(i) of the Code.

**Robert Simpson & Tracey Pringle**

The Board is satisfied that the shortages of grain shipments beginning in June 1995 prompted the employer to move operations and equipment to Abbotsford. However, the Board concludes that the employer's anti-union animus was a proximate cause of the particular timing of these moves and of the particular individuals selected for lay-off.

It was to be expected, for example, following the June 1, 1995 letter from James Richardson and Sons, that the employer would seek to prepare to alter its operations accordingly and to canvas its employees concerning the possibility of their moving to Abbotsford. The second letter from Richardson, however, makes clear that as of June 9, the employer could expect grain volumes through Kelowna to continue at the rate of 14 to 16 cars per week - slightly below average - through mid-August. It is highly suspicious, therefore, that the employer chose June 5, 1995, following the union meeting of June 3, to inform its employees of imminent transfers and to require replies by the end of the week.

Moreover, following the second letter from Richardson dated June 9, the day following the employer's receipt of the certification application targeting bulk drivers, the Board finds it highly suspicious that the employer chose to act that same day to revise its offers to its employees and to inform them that, contrary to its earlier instruction, there would be no bulk grain to haul out of Abbotsford either.

The Board concludes that before June 9, 1995, the employer could anticipate that grain volumes through Kelowna would decrease somewhat at some time in mid-August and not before. The attempt, therefore, so shortly after the union meeting to transfer equipment and personnel out of Kelowna can only be seen as an attempt to undermine unionization. As such, the Board is satisfied on the balance of probabilities that the employer's actions constitute a breach of section 24(4) of the Code.



The Board further concludes that after June 9, 1995 it was not immediately necessary to transfer a large number of its Kelowna employees to Abbotsford. Given the scale of the employer's operations - exhibit 32 lists 31 owner-operators and company drivers operating out of Kelowna - and given the 6% drop in revenue from May to June, the Board finds that those employees who ordinarily hauled bulk grain out of Kelowna and who wished to stay in Kelowna could have been accommodated by an offer of flatbed work. It is in this context that the employer's choice of those for transfer and lay-off must be evaluated.

Robert Simpson was called to a tape-recorded meeting with Ray Shaw on June 7, 1995. He was offered a transfer to Abbotsford to haul bulk grain. On June 9, he was informed that the possibility of bulk-hauling was no longer available and that if he wanted to continue with the company, he would have to operate flatbeds out of Abbotsford.

Simpson stated that MacGillivray told him that he would never again work out of Kelowna for the company. He stated "junior" employees were retained by the employer and that, living directly across from the employer's place of business, he often saw his tractor pulling out of the yard. In all the above circumstances, the Board finds Simpson's evidence on these points credible.

The Board therefore finds that the employer has not discharged the onus to show that anti-union animus had nothing to do with Simpson's lay-off. Consequently, it finds that said lay-off violated section 94(3)(a)(i) of the Code.

Tracey Pringle was told upon returning to work after his injury that there was no more work for him. Apparently, both mechanic's helpers had been assigned to flatbed work as early as June 5, 1995 when Pringle pulled Kapalka's load to Washington. If Pringle was indeed transferred to long-haul flatbed work as of June 5, this was clearly premature. However, the moment which is of importance to Pringle is July 4, when

he came off worker's compensation. At that time, the employer told him flatly that there was no possibility of employment unless he moved to Abbotsford and drove long-haul flatbed routes.

Pringle testified that he could not leave Kelowna at that time for personal reasons to do with an estate matter. Tracey Pringle further testified that Terry Trahan, his fellow mechanic's helper, continued to work out of Kelowna and that, had it not been for this fact, he would never have filed his complaint. Trahan is his junior in seniority, a fact that was not contested by the employer. The employer gave no credible reason for preferring Trahan to Pringle. Finally, the Board accepts Pringle's testimony concerning events on June 3 and prefers it to that of MacGillivray. The Board found Pringle to be a forthright witness whose candid recounting of the events of that day belies any of the employer's attempts to put his credibility in doubt.

In the circumstances, the Board finds that the employer has not met the onus to show that anti-union animus had nothing to do with Pringle's lay-off. Consequently, it finds that said lay-off violated section 94(3)(a)(i) of the Code.

## V

Where an employee is illegally dismissed or laid off, reinstatement with full compensation is the usual remedy awarded by the Board. The employer has argued, however, that reinstatement is not appropriate in this case since the work these employees previously did no longer exists.

The Board accepts that, at the time of the hearing, the amount of bulk work out of Kelowna was considerably less than in June 1995. However, the Board has no evidence concerning the amount of work that exists at the time of the present decision or will exist in the future.

However, the Board does not accept the employer's submission that these drivers are not suitable for other types of work whether in Kelowna or in Abbotsford. The Board rejects the employer's arguments with respect to its preference for keeping those drivers who knew how to operate all of its different kinds of equipment and notes that the employer has professed to otherwise respect service time in its decisions to lay off employees.

Moreover, the Board accepts that Robert Simpson and Tracey Pringle have expressed their unwillingness to do long-haul flatbed work out of Abbotsford. However, the Board finds that the choice between long-haul flatbed work out of Abbotsford and lay-off should not have been put to them at that time. For this reason, the Board does not consider this expression of their will to be of any consequence.

The Board notes that the Teamsters' application for certification has been dismissed for reasons unrelated to majority support or to any employer conduct and declines to order any remedy directly to the union with respect to the bargaining unit sought. Similarly, in the interest of facilitating the integration of the individual complainants, the Board will not order any publication, mailing or posting of this decision.

For the above reasons, the Board:

1. Declares that the employer has contravened sections 94(3)(a)(i) and 94(3)(e) of the Code.
2. Declares that the employer has contravened section 24(4) of the Code.
3. Declares that the employer has contravened section 96 of the Code.
4. Declares that the employer has contravened section 94(1)(a) of the Code.

5. Orders that Doug Kapalka, Denny Proulx, Paul Donovan, Tracey Pringle and Robert Simpson be offered employment with the employer within two weeks of receipt of the above decision in accordance with the following criteria:
  - (a) Service time with the employer for the complainants and for incumbent employees is to be measured as of the original date of hiring.
  - (b) Offers are to be made in the following order:
    - (i) Where any employee with less service time than Tracey Pringle is currently filling the position of mechanic's helper at the Kelowna branch, Tracey Pringle is to be hired in that position. If the Kelowna branch no longer operates a mechanical repair facility, Tracey Pringle is to be offered a driver's position as set out below.
    - (ii) Where the service time of one or more of the complainants exceeds that of any person driving and/or being dispatched out of Kelowna on principally short-term trips, those complainants are to be offered driving employment out of Kelowna for short-term trips.
    - (iii) Where the service time of one or more of the complainants exceeds that of any person driving and/or being dispatched out of Kelowna, those complainants are to be offered driving employment out of Kelowna.
    - (iv) Where the service time of one or more of the complainants exceeds that of any person driving and/or being dispatched out of Abbotsford on principally short-term trips, those complainants are to be offered driving employment out of Abbotsford for short-term trips.

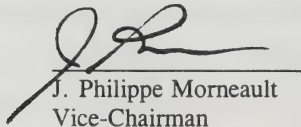


- (v) Where the service time of one or more of the complainants exceeds that of any person driving and/or being dispatched out of Abbotsford, those complainants are to be offered driving employment out of Abbotsford.
  - (vi) Where the service time of one or more of the complainants does not exceed that of any person driving and/or being dispatched out of Kelowna or Abbotsford, those complainants are to be recalled when work becomes available in preference to any employee or prospective employee with less service time.
  - (c) The offers shall be made either in writing or orally in the presence of a Teamsters' representative.
  - (d) Where training is necessary to familiarize the complainant with the equipment to be operated, this training will be provided by the employer. Time spent training is to be compensated.
  - (e) Once a complainant has accepted an offer, the employer is not obliged to make him another offer.
  - (f) Once a complainant is again working for the employer, the employer shall not discriminate against the complainant in respect of his work in any way contrary to the provisions of section 94(3) of the Code.
6. Orders that all the complainants are to be fully compensated with interest for wages and other benefits they would have in fact gained from the time of their dismissal or lay-off to the time of the offer of their reinstatement. They are to be compensated whether or not they accept the offer of reinstatement according to the principles set out by the Board in Victoria Flying Services Ltd. et al. (1979), 35 di 73; and [1979] 3 Can LRBR 216 (CLRB no. 199);

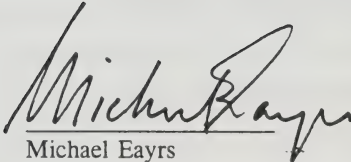
Samuel John Snively (1985), 62 di 112; and 12 CLRBR (NS) 97 (CLRBR no. 527); and Voyageur Inc. (1988), 73 di 209 (CLRBR no. 685).

The Board appoints Mr. Harvey Farysey, senior labour relations officer, to assist the parties in implementing the present decision.

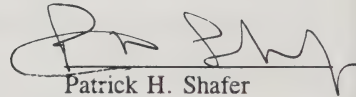
The Board retains its jurisdiction to decide any issue arising out of the implementation of this order including any future discriminatory practices against the employees.



J. Philippe Morneault  
Vice-Chairman



Michael Eayrs  
Member



Patrick H. Shafer  
Member

# Information

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## Summary

Andreas Angellakis, *complainant*, and Amalgamated Transit Union, Local 1415, *respondent*.

Board File: 745-5171  
CLRB/CCRT Decision no. 1192  
December 13, 1996

## Résumé

Andreas Angellakis, *plaignant*, et Syndicat uni du transport, section locale 1415, *intimée*.

Dossier du Conseil: 745-5171  
CLRB/CCRT Décision n° 1192  
le 13 décembre 1996

The complainant, Andreas Angellakis alleged that the Amalgamated Transit Union, Local 1415 (the ATU), violated section 95(f) of the Code by denying him membership or purporting to limit his membership rights in the ATU in a discriminatory manner.

The complainant, a former Voyageur bus driver, became Greyhound's employee following a sale of business. He sustained a work-related injury prior to the sale and remains disabled to this day. The union first refused Angellakis membership on the grounds that the ATU constitution requires individuals to be "working" at the time of their application. In an attempt to accommodate, it did however offer him "member at large" status and finally "pensioner status" which is short of full membership.

The union relied on the strict language of its constitution as well as the established practice of the Local whereby disabled members who are not likely to return are placed on pensioner roster following a year's absence from work.

Le plaignant, Andreas Angellakis allègue que le Syndicat uni du transport, section locale 1415 (le SUT), a enfreint l'alinéa 95f) du Code en lui refusant le droit d'adhérer au syndicat ou en tentant de limiter ses droits d'adhésion au SUT de façon discriminatoire.

Le plaignant, un ancien chauffeur d'autobus de Voyageur, est devenu un employé de Greyhound par suite d'une vente d'entreprise. Il s'était blessé au travail avant la vente et est toujours frappé d'incapacité. Le syndicat a d'abord refusé à M. Angellakis le droit d'adhérer parce que les statuts du SUT exigent que les personnes «travaillent» au moment où elles présentent une demande d'adhésion. Pour lui venir en aide, le syndicat lui a tout de même offert le statut de «membre ordinaire» et enfin le «statut de retraité», ce qui n'est pas une adhésion pleine et entière.

Le syndicat se fonde sur le libellé strict de ses statuts et sur la pratique établie de la section locale en vertu de laquelle les membres frappés d'incapacité qui ne reviendront probablement pas sont placés sur la liste des retraités s'ils n'ont pas travaillé pendant une année.

The complainant argued that his exclusion from full membership constitutes a discriminatory application of the union membership rules to the disabled.

Having regard to its broad definition of discrimination, the Board concluded that the denial of full membership in this instance does not constitute direct or intentional discrimination. As to the consideration of adverse effect discrimination, it is encompassed in the Board's customary analysis which properly balances the interest of the parties by considering the application of a general rule to an individual case.

Thus, the Board found that the union would have improperly applied the "working" or entry rule to exclude Angellakis wholly from membership. As to the limitation of his membership rights, after more than two years' absence without the imminent prospect of his resuming work, and having necessarily balanced the institutional interest of the union and the individual rights of the complainant, the Board concluded that the pensioner status offered to Angellakis is commensurate with his present position and interest in the bargaining unit. Accordingly, the complainant's right to participate in the lawful activities of the trade union of his choice pursuant to section 8 of the Code has not been limited in a discriminatory manner.

Le plaignant prétend que son exclusion du syndicat en tant que membre de plein droit constitue une application discriminatoire des règles d'adhésion aux personnes frappées d'incapacité.

Eu égard à sa définition large de la discrimination, le Conseil conclut que l'exclusion en l'espèce ne constitue pas de discrimination directe ou intentionnelle. En ce qui a trait à la question de discrimination par suite d'un effet préjudiciable, elle fait partie de l'analyse habituelle du Conseil, analyse qui contrebalance les intérêts des parties en tenant compte de l'application d'une règle générale à une affaire en particulier.

Par conséquent, le Conseil juge que le syndicat n'aurait pas bien appliqué la règle «d'admission» s'il avait exclu M. Angellakis totalement des rangs du syndicat. En ce qui concerne les restrictions de ses droits d'adhésion, après plus de deux ans d'absence sans possibilité de retour prochain au travail et après avoir nécessairement contrebalancé les intérêts collectifs du syndicat et les droits individuels du plaignant, le Conseil conclut que le statut de retraité offert à M. Angellakis correspond à sa situation actuelle et son intérêt à l'unité de négociation. Par conséquent, le droit du plaignant de participer aux activités licites du syndicat de son choix aux termes de l'article 8 du Code n'a pas été limité d'une façon discriminatoire.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.



## Reasons for decision

Mr. Andreas Angellakis,

*complainant,*

*and*

Amalgamated Transit Union, Local 1415,

*respondent.*

Board File: 745-5171

CLRB/CCRT Decision no. 1192

December 13, 1996

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Patrick H. Shafer and Ms. Roza Aronovitch, Members. A hearing was held on February 15, 1996 in Toronto.

### Appearances

Mr. Andreas Angellakis, on his own behalf; and

Mr. William Noddle, for the respondent.

These reasons for decision were written by Ms. Roza Aronovitch, Member.

## I

### THE FACTS

On September 3, 1995, the complainant, Andreas Angellakis filed a complaint with the Board alleging that his union, the Amalgamated Transit Union, Local 1415 (the ATU), had violated section 95(f) of the Canada Labour Code by denying him union membership in a discriminatory manner.

Angellakis was employed by Voyageur Colonial Limited (Voyageur) since March 21, 1975. On December 27, 1993 he sustained a work-related motor vehicle accident and

as a result has been disabled since January 10, 1994. Subsequently, during 1994, following a sale of Voyageur's routes to Eastern Greyhound Canada (Greyhound) amounting to a sale of business pursuant to section 44 of the Code, numerous Voyageur operators including the complainant transferred to Greyhound and were intermingled with employees already in Greyhound's employ. Following a representation vote, the ATU was named as bargaining agent for the new bargaining unit. Angellakis, then on disability for roughly a year, was among the Voyageur employees who voted during the representation vote.

All previous CAW-Canada members working with Voyageur at the time of the sale who thereafter transferred to Greyhound, including Angellakis, were forwarded membership certificates by the ATU. When Angellakis attempted to submit his initiation fee and dues he was advised by William Noddle, President of ATU Local 1415, that his certificate had been issued by error and that in accordance with section 21.1 of the ATU constitution, he could not accede to ATU membership because he had never actively worked for Greyhound.

Section 21.1 of the Constitution states:

*"A candidate to be admitted to membership in any local union of the Amalgamated Transit Union must be of good moral character and a competent worker in his or her line of work. **He/She must be working in some capacity in which he/she is eligible to membership at the time he/she applied and is initiated into membership in the union.**"*

(emphasis added)

At the relevant time, Angellakis was not working due to his continuing incapacity. While Angellakis has not worked as a bus driver since January 10, 1994, he is currently a Greyhound employee and his name continues to appear on the employee seniority list. The union acknowledges that Angellakis enjoys full representation rights insofar as his rights as a member of the bargaining unit subsist. It has in fact

already interceded on Angellakis' behalf to secure the continuation of his health benefits from Greyhound and proposed to grieve the matter should the issue not be satisfactorily resolved.

As of the time of Angellakis' rejection from membership, the union and he exchanged correspondence and met numerous times in order to accommodate his circumstances. The union assured Angellakis that there would be no impediment to his becoming a member when he resumed work. In the meantime, the ATU first offered him "member at large" (MAL) status which carries with it certain restrictions in membership privileges. There was also some discussion as to whether Angellakis could be eligible for "pensioner" status given that he had never actively worked for Greyhound.

Noddle explained at the hearing that it has been the practice of Local 1415 to place on pensioner status any member of the Local who is off work for a year, due to prolonged illness or injury, and is not expected to return to active service. If the complainant had worked for Greyhound at any time and been admitted to membership, his full membership privileges would, in any case, have been restricted as a result of his continuing incapacity. As with all members of the Local, had the complainant been a full-fledged member he would have been put on pensioner status following one year's absence from work without the prospect of resuming active duty. Having said that, as of the date of the hearing, Angellakis had not been formally offered pensioner status. Indeed, it is regrettable that his only occurred following the Board's intervention.

On March 28, 1996, the ATU advised the Board that following a meeting of its executive board, it was prepared to offer Angellakis pensioner status on the understanding that Angellakis pay all back dues as well as the initiation fee. While a pensioner carries with it broader privileges than an MAL, it is short of full membership and in particular does not allow the pensioner to stand for elected office. On April 1, 1996, Angellakis, who had already expressed his disenchantment with

pensioner status, responded by refusing the union's offer and requesting that he be accorded full active membership in the ATU.

## II

### THE COMPLAINANT'S POSITION

Angellakis asserts that he is vitally interested in his union. He describes union activity as being "his life", having been involved at all levels of CAW-Canada for some 27 years. He argues that the denial of full active membership in the union is bound to have a negative impact on him personally. He also alleges that the union's motivation for excluding him from full membership is his strong support and advocacy on behalf of CAW-Canada, especially at the time of the representation vote.

The complainant dismisses membership at large as being a largely "symbolic" status that adds nothing to his current position. He points out that the status under the constitution is given to those who are "furloughed" or on leave for more than a year. As he is not furloughed but on disability, the proposal in his view represents an unsuitable and inappropriate compromise. As to the possibility of pensioner status, the complainant states that he is not in receipt of a pension and therefore is not a pensioner. He argues that the practice of deeming persons on disability to be "pensioners" after one year of absence from work is an arbitrary practice that is not founded in the union constitution or by-laws. He submits that the exclusion of persons on disability from membership, or indeed the limitation of their rights following a prolonged absence from the work place, constitute discriminatory applications of the ATU membership rules to disabled members.

As regards his own state of health, Angellakis states that the clinical diagnosis of his illness is "post traumatic vertigo". According to his testimony, his doctor describes his state as being "a permanent condition at this time". His own assessment is that he is "healthy" but unable to drive a bus due to vertigo. Angellakis does not recall



ever having told Noddle that he would not be returning to work, although he does concede that he is not likely to do so. Having said that, he maintains his position that whether he can drive a bus again, or indeed ever return to work for Greyhound in any capacity, is not relevant since he is and remains a Greyhound employee on the employee seniority list and as such must have the right to participate fully in union affairs.

### III

#### THE UNION'S POSITION

The union for its part relies on the strict language of the constitution which requires that an individual be "working" in order to be admitted to membership.

Secondly it argues that to grant automatic full union membership to Angellakis would exceed the rights afforded to their own life-time members who may be retired, furloughed on long-term disability, or otherwise not actively employed. The respondent argues that even if Angellakis had been actively employed at Greyhound at any point, he would now find himself a "pensioner" as his disability continued beyond a year without the imminent prospect of return. While there is no such rule expressly set out in the union's Constitution, the union argues however that article 21.14 of the Constitution dealing with furloughed employees applies by analogy. Article 21.14 provides that "members leaving active service for reasons other than retirement or pension" such as furloughed members, can retain membership in the Local union for a year from the last day of the month of lay-off. If they are not thereafter recalled and desire to retain membership they have the right to become MLAs.

As for the pensioner status, the Local defends its long-standing practice of placing long-term disabled members on the pensioner roster as being appropriate, beneficial

for the membership, and commensurate with their interest and level of activity in union affairs. Indeed, the union makes the point that two former colleagues of Angellakis had been Voyageur drivers, had taken up employment with Greyhound and later became incapacitated and had, at their own request, had their pensioner status accelerated. Both having acknowledged that they were not likely to come back to work, they wanted a commensurate reduction in their assessment of dues on the basis of their diminished interest and involvement in union affairs.

The union considers Angellakis' circumstances to be similar to that of its members who are not actively working and not expected to return to work. While Angellakis insists he is asking for the same union rights as the other drivers, the union argues that the complainant continues to request what amounts to preferential treatment and a greater status than that accorded to life-long ATU members.

The ATU denies Angellakis' allegation that it is attempting to deprive him of full membership due to his past support of the CAW-Canada. The union relies exclusively on the provisions of its Constitution and its long-standing practice and argues that it has no apprehension of union members who get involved in legitimate union activities in accordance with the ATU constitution.

The respondent further affirms and has demonstrated that it is ready at all times to take its responsibility in representing Angellakis as a member of its bargaining unit and in respect of any of his rights arising out of the collective agreement. The union argues therefore that Angellakis is not disadvantaged in any way in respect of his representation under the collective agreement and is furthermore also not prejudiced by virtue of exercising the more limited rights of a pensioner under the ATU constitution.

#### IV

#### DECISION

The relevant provisions of the Code read as follows:

*"8.(1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.*

...

*95. No trade union or person acting on behalf of a trade union shall*

...

*(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union; ..."*

The objective of Parliament in enacting the latter section was to strike a balance between the institutional interests of the unions and the individual rights of its members. The nature of the tension between these two interests was set out in Fred J. Solly (1981), 43 di 29; [1981] 2 Can LRBR 245; and 81 CLLC 16,089 (CLRB no. 296):

*"The problem faced by the legislators and the Board in assessing the limits of Parliament's control of internal union affairs is difficult. The essential difficulty is to balance the competing interests that flow from the reality that individuals find real security and protection of their rights through association, but the associated organization best ensures its efficiency by limiting the freedom of those who have entered into it."*

(pages 45; 257; and 566)

The current labour relations framework clearly calls for the Board to balance the respective interests of the union and the individual. As set out by James Dorsey, this balancing is the substance of the Board's decision in each case:

*"In each case the issue for the Board was framed in the terms of the specific statutory provisions alleged to have been contravened. Much of the Board's discussion focuses on the particular alleged unfair labour practice, but the underlying concern and central thrust of the decisions is to balance the right of the individual to participate in the affairs of the union, which is his bargaining agent, against the lawful activities and interests of the union which favour denial of membership generally or to the specific individual. ..."*

(James Dorsey, "Individuals and Internal Union Affairs: the Right to Participate" in Swan and Swinton, eds, Studies in Labour Law (Butterworths: Toronto, 1982), page 200)

Parliament's choice in striking this balance was not to give the Board a right to sit in appeal of a trade union's decision nor to allow it to control the contents of a union constitution. Instead, Parliament gave the Board the power to intervene in the internal affairs of trade unions only when and where union rules or actions could be said to be discriminatory.

Therefore, the key question the Board must answer is whether or not the rule or the application of the rule can be said to be discriminatory. The Board has consistently adopted a wide definition of discrimination. In the case of Terry Matus (1980), 37 di 73 (CLRB no. 211) at page 86, the Board wrote the following:

*"As to a definition of these last two words, this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers, [1978] 2 Can LRBR 105 at p. 108:*

*'In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds*



*that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S., 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule or policy is one that bears no fair and rational relationship with the decision being made. ..."*

(page 108; emphasis added)

Disability is one of the protected grounds under the Canadian Human Rights Act (R.S.C. 1985, Ch. H-6). However, in the opinion of the Board, the distinction drawn with respect to the complainant does not constitute direct or intentional discrimination pursuant to that legislation. The union has not denied Angellakis membership or purported to limit his membership rights because he is disabled but rather because he is not working; as a result, his argument might only be one of indirect or adverse effect discrimination. Human rights law has developed considerably since McCarthy, supra. As the purpose and scope of the two statutes are different in important respects, it is not certain to what extent the term "discriminatory manner" found at section 95(f) of the Code includes the types of indirect discrimination against disabled persons which have recently been found to be protected by the human rights codes. However, the Board need not decide this question, given that its customary analysis, much like that under the Human Rights Code, properly balances the interests of the parties by considering the application of a general rule to an individual case.

Indeed, the scope of the Board's definition of discrimination anticipates and encompasses indirect discrimination. Specifically, regardless of the particular ground of discrimination alleged, where a rule that is not in itself discriminatory is applied beyond the logical scope of its operation, the rule loses its rational relationship with the decision being made and the union's decision to apply the rule in such a case, will be found to be discriminatory. An example of the Board's analysis in these cases is

Gérard Cassista et al. (1978), 28 di 955; and [1979] 2 Can LRBR 149 (CLRB no. 161) where the Board set out the focus of its enquiry as follows:

*"A rule which is not in itself discriminatory, may become so, however, when applied. We must ask ourselves whether the union's membership rule, applied to the complainants, is discriminatory. In other words, we must ask whether the reasons for which this rule was established are justified with respect to the complainants."*

(p. 979; and 168; emphasis added)

In that decision, the Board decided that a rule that was established in order to deal with a lack of work was not justified when applied to a group of employees who did not suffer from a lack of work.

In the present case, the Board must decide whether the rules put forward by the union to justify its refusal of membership are "justified" when applied to the complainant. In respect of the denial of membership to Angellakis, the union argues that the complainant has never worked for the company and therefore, according to the terms of article 21.1 of the Constitution, he has no right to membership ("the entry rule").

The Board does not doubt that the entry rule is improperly applied to the complainant to preclude him wholly from membership. Although the union did not fully explain its rationale for the rule, the Board is satisfied that such rules, which are not uncommon in union constitutions, are designed to require a connection with the work place, such that members are not, as Angellakis calls it, persons "off the street".

Applied to such cases, the Board has no difficulty with the rule. The union has a right to limit its membership to those individuals who have an interest in its affairs in order to protect the integrity of its internal processes. Given that the union's principle purpose is to represent employees vis à vis the employer, anyone who is not an employee may rightly be excluded from membership due to a lack of interest in the

union's internal affairs. This was clearly Parliament's intention when it saw fit to extend the protection given in article 8 only to employees.

The complainant, however, is formally an employee and was a full member of the union representing the interests of his bargaining unit at the time of the sale of business which intermingled the two bargaining units. Therefore, while it is strictly correct to assert that the complainant has never actively worked at Greyhound, he has worked for more than 15 years for the business that was sold to Greyhound and for which the respondent now holds the exclusive bargaining rights, and he is a Greyhound employee. In point of fact, it is only because of the technicalities involved in a sale of business that the union could argue that the complainant had to "apply" for membership. Had the situation been one of merger or amalgamation of unions under section 43 of the Code, the question would never have arisen because the complainant would never have had to apply to become a member. It is worth noting in this regard, that the union automatically extended membership to all former Voyageur employees who chose to transfer to Greyhound and only subsequently excluded the complainant on the basis of the strict language of the constitution.

The Board is thus of the opinion that while the general rule is reasonable, the reasons for which the rule was established are not justified with respect to the complainant and that, consequently, the union would have applied its membership rules to him in a discriminatory manner, had it sought to exclude him altogether from membership. In fact the union has not done so. It has attempted instead to accommodate Angellakis by offering him limited membership first as an MAL and then as a pensioner. As a result, the rule that, as a practical matter, the Board must examine is the Local's established practice, whereby members who are off work for more than a year due to prolonged illness or injury and are not expected to return to work are placed on pensioner status with limited membership ("the limitation rule"). While no such rule is expressly set out in the union's constitution, the Board accepts that this has been the Local's practice in the past.

With respect to the limitation rule, the Board must similarly determine whether the reasons for the rule are justified with respect to the complainant's case.

The union did not provide a rationale for the "limitation rule" other than as stated above. It may be the case in certain instances that such rules are imposed to secure an abatement in the union's administrative or other obligations such as, for example, the payment of certain union benefits. Such circumstances were not argued in this case as constituting justification for the rule. The Board has therefore proceeded on the basis of what is, broadly speaking, the reason for such rules, namely the correspondence of membership privileges and union obligations to the actual interest of the individual in the functioning of the bargaining unit and accordingly of the union. The union's interest in such cases presumably includes the protection of the integrity of the union's internal processes by preventing individuals who no longer have sufficient interest in the affairs of the bargaining unit from having an influence on the conduct of the union's affairs, thereby ensuring that its decisions will be taken in the interests of those it has the mandate to represent.

These types of rules are likewise commonly found in union constitutions. Typically, a constitution will provide one or more types of membership that entail less rights than a full membership. The main targets of such rules are individuals who retire, who are on leave, laid off, decertified or transferred to another jurisdiction. Less frequently, the constitution will specifically provide for disabled employees. Generally, such memberships do not allow the "member" to run for office or elect those who will make up the executive or represent the employees as shop stewards or grievance officers.

A rule of this nature that is applied to individuals must be dealt with on its own merits in each case. Subject to that overriding principle, the Board concludes that generally, "limitation rules" are reasonable insofar as they apply to retirees, long-term lay-offs with little or no chance of recall and others whose circumstances result in prolonged absences from the workplace with very little likelihood of returning. Such persons



clearly do not have the same interests in the affairs of the bargaining unit as do active employees. Indeed, the length of an individual's absence from the workplace and likelihood of their returning have been acknowledged as appropriate standards for evaluating the sufficiency or continuity of interest in the affairs of the bargaining unit in connection with the eligibility of laid-off and disabled employees to vote for the bargaining agent of their choice. (see for example Robin Hood Multifoods Limited (1978), 25 di 449; and [1978] 2 Can LRBR 369 (partial report); 78 CLLC 16,165 (CLRB no. 136); Steve Baidwan (1985), 62 di 99; and 85 CLLC 16,046 (CLRB no. 526; and Canac Kitchens Ltd. [1978] OLRB Rep. Aug. 723). The Board finds therefore that the "limitation rule" that the union is seeking to impose in this instance is not in and of itself discriminatory pursuant to section 95(f).

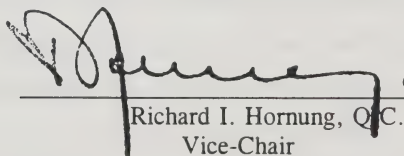
Regarding the complainant's circumstances, the Board is not satisfied that his return to work is at all likely. The complainant has been off work since January 10, 1994 (two and one-half years at the present time). His condition has been diagnosed as "a permanent condition at this time" and there is no indication that his return to work in the near future is imminent. He frankly admits that his return is improbable. This is the only evidence the Board has concerning his possible return. In the circumstances, it is reasonable to presume, as does the rule that the union seeks to apply, that the complainant, after more than a year off work, no longer has a sufficient interest in the affairs of the bargaining unit to maintain full union membership.

Moreover, the Board finds that the extent of the complainant's continuing interest in the union is limited compared to working members of the bargaining unit. There was no evidence that the pensioner status that was accorded him is not commensurate with his present position and interest in the bargaining unit. In the present case, the complainant's pensioned status allows him, pursuant to article 21.13 of the union constitution, to participate in the functioning of the Local union with the right to speak on any issue. While a pensioner may vote to elect all Local officers and delegates to conventions, the constitution does not allow him to vote for or serve as an officer of

the union. The Board is not satisfied that this status compromises the ability of the complainant to participate in decisions which might conceivably affect his economic rights.

The Board is sympathetic to the complainant's concerns that he is being cut off from the political and social life of the union. Moreover, it is clear that the basic rights of union citizenship are protected by the Code whether or not an economic or employment interest is also involved (see, for example, Fred J. Solly, supra). However, the Board must weigh this interest against the union's interest to protect the integrity of its internal processes in light of its mandate to represent the employees of the bargaining unit.

In the result, therefore, the Board finds that the union has not violated section 95(f) by limiting complainant's membership to that of pensioner status. Considering that the union has offered pensioner status to the complainant, the Board finds that the complainant's right to participate in the lawful activities of the trade union of his choice pursuant to section 8 of the Code has not been limited in a discriminatory manner. For this reason, the complaint is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair



Patrick H. Shafer  
Member



Roza Aronovitch  
Member

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## Summary

Robert Llewellyn, *complainant*, Teamsters Local Union 938, *respondent*, and Purolator Courier Ltd., *employer*.

Board File: 745-5238  
CLRB/CCRT Decision no. 1193  
December 13, 1996

The complainant alleges that his union breached section 37 of the Code by failing to proceed to arbitration with his lay-off grievance despite telling him it would do so. He considers that having paid union dues, his union as his representative is required to challenge his lay-off irrespective of how difficult that may be.

The complainant's position, while understandable, runs contrary to the well-established case law on the duty of fair representation, namely that an employee does not have an absolute right to arbitration. The union has a considerable amount of discretion in this regard provided that, in deciding not to proceed with a grievance, it has thoroughly considered the merits of the case and has not exercised its authority unfairly or in a manner that is discriminatory or in bad faith.

In the present case, the Board found that the union acted within the bounds of its discretion. The decision not to pursue the complainant's grievance was taken only after a thorough investigation had been conducted and after union officers concluded that the

## Résumé

Robert Llewellyn, *plaignant*, section locale 938 de la Fraternité internationale des teamsters, *intimée*, et Purolator Courrier Ltée, *employeur*.

Dossier du Conseil: 745-5238  
CLRB/CCRT Décision n° 1193  
le 13 décembre 1996

Le plaignant allègue que son syndicat a violé l'article 37 du Code en ne renvoyant pas à l'arbitrage son grief contestant sa mise à pied, malgré le fait que ce dernier lui avait dit qu'il le ferait. Il estime que, étant donné qu'il a versé des cotisations syndicales, son syndicat, en sa qualité de représentant, est tenu de contester sa mise à pied, quelque difficile que cela puisse être.

La position du plaignant, quoique compréhensible, ne s'accorde pas avec la jurisprudence bien établie sur le devoir de représentation juste, soit qu'un employé n'a pas de droit absolu à l'arbitrage. Le syndicat a beaucoup de discrétion à cet égard, à condition que, lorsqu'il décide de ne pas donner suite à un grief, il ait bien examiné le bien-fondé de l'affaire et n'ait pas exercé son pouvoir de façon injuste ou d'une manière arbitraire ou de mauvaise foi.

En l'espèce, le Conseil conclut que le syndicat a respecté les limites de son pouvoir discrétionnaire. La décision de ne pas donner suite au grief du plaignant n'a été prise seulement après qu'une enquête approfondie eut été menée et que les dirigeants syndicaux

grievance would not succeed. The Board is satisfied that the union turned its mind to the problem and has respected its obligations pursuant to section 37 of the Code.

This case also addresses the status of the employer in the context of a section 37 complaint. While the employer may present submissions on the question of remedy, its role with respect to the merits is restricted to that of an observer since its actions are not at issue and it has no case to defend.

The complaint is dismissed.

eurent conclu que le grief ne pouvait réussir. Le Conseil est convaincu que le syndicat s'est penché sur le problème et a rempli les obligations que lui impose l'article 37 du Code.

La présente affaire porte également sur le statut de l'employeur dans le cadre d'une plainte fondée sur l'article 37. Même si l'employeur peut présenter des observations portant sur le redressement, son rôle, quant à bien-fondé, se limite à celui d'observateur puisque ses actes ne sont pas en litige et qu'il n'a pas d'affaire à défendre.

La plainte est rejetée.

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LES MOTIFS DE DÉCISION DU CCRT SONT  
MAINTENANT ACCESSIBLES DANS QUICKLAW.



## Reasons for decision

Robert Llewellyn,

*complainant,*

*and*

Teamsters Local Union 938,

*respondent,*

*and*

Purolator Courier Ltd.,

*employer.*

Board File: 745-5238

CLRB/CCRT Decision no. 1193

December 13, 1996

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Ms. Sarah E. FitzGerald and Ms. Roza Aronovitch, Members.

### Appearances

Mr. Robert Llewellyn, on his own behalf;

Mr. T. Stephen Lavender, counsel, and Mr. Wayne Maslen, Business Representative and Recording Secretary, for Teamsters Local Union 938; and

Ms. Kirsten Ramage, counsel, and Ms. Jaana Harkonen, Human Resources Manager, for Purolator Courier Ltd.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

I

The complainant, Mr. Robert Llewellyn, filed a complaint claiming that the respondent union violated section 37 of the Canada Labour Code by failing to represent him with respect to his lay-off. More specifically, Mr. Llewellyn submits that his union has not proceeded to arbitration with his lay-off grievance despite its promise to do so. After a period of a year, he has not been reinstated nor has he received any compensation. Moreover, he has not heard from the union with respect to the status of his grievance.

Section 37 reads as follows:

*"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."*

The Board decided to hold a public hearing in this matter. The hearing was held in Toronto on August 20-21, 1996.

II

Mr. Llewellyn had been employed as a driver by Purolator Courier Ltd. at its U.S. Northbound depot in Mississauga, Ontario. Following the loss of his driving licence in February 1994, he bid upon and obtained a position as a sorter at the same location. The duties of this position included the pick-up of parcels from a Federal Express depot for "Vistakon", one of Purolator's clients. Since the complainant was unable to drive, the parcels were picked up by other couriers returning to the depot at the end of their runs. According to the complainant, the time involved for this aspect of the job amounted to 15 minutes per day. After some time, Purolator decided that the position would be modified to include some driving duties related to the

Vistakon pick-ups. Mr. Llewellyn, having lost his licence, could not perform the duties of the hybrid position and, after having declined a sorter position at another depot, he was laid off on September 2, 1994.

Mr. Llewellyn believed that there was no justification for his lay-off since his job did not cease to exist. He testified that his replacement did not pick up the mail on a regular basis and the practice of having others obtain the Vistakon mail continued. He questioned the timing of his lay-off, contending that it resulted from having complained to the company president about the behaviour of his supervisor, Ms. Cindy Mantin.

In response to the lay-off, he filed two grievances. The first alleged that his lay-off was related to harassment by his supervisor. The second contested his lay-off as being improper on the grounds that the job did not require driving. Prior to a grievance meeting held on September 26, 1994, Mr. Llewellyn discussed his grievances with Mr. Wayne Maslen, the union business agent. While the grievance contesting the lay-off was considered to have merit, Mr. Maslen suggested that they drop the "harassment" grievance given the difficulty of proving such a case.

Mr. Llewellyn was present at the grievance meeting along with Mr. Mike Morefesis, his shop steward, and Mr. Maslen, as well as management personnel Ms. Cindy Mantin, Mr. Milan Mochin, and Ms. Jaana Harkonen. Mr. Maslen argued that the lay-off was improper and advised management that the grievance would be brought to arbitration. As for the "harassment" grievance, Mr. Llewellyn admitted that it was, in fact, dropped at that time.

Mr. Llewellyn stated that he believed the procedure consisted of three grievance meetings before arbitration and expected to be contacted when a second grievance meeting was scheduled. After some time had elapsed, he contacted Mr. Morefesis who told him he would call when he had further news. In Mr. Llewellyn's recollection,

he attempted to speak to Mr. Maslen and left several messages, but his calls were not returned.

Six or seven months later, Mr. Llewellyn heard from another employee that he could have his job back. He sought confirmation. However, his attempts to reach Ms. Harkonen of Labour Relations were unsuccessful and Mr. Morefesis was unable to provide him with any details. Moreover, since he had not been contacted by Mr. Maslen, he sent him a fax in July 1995 asking for clarification as to his reinstatement. He testified however that, at that time, he had moved to Oshawa and, without a car, it would have been difficult to travel to the Mississauga depot.

Mr. Llewellyn was under the impression from the information provided by his shop steward that the union had one year to deal with a grievance, and was concerned about delays since the year was coming to an end. In the absence of any contact from the union, he decided to consult a lawyer. Mr. Llewellyn stated that his counsel advised him to file a complaint with the Board. In the interim, following an exchange of correspondence between counsel and Mr. Maslen, Mr. Llewellyn's counsel informed the complainant that the union considered they would have little success in contesting his lay-off which resulted from the creation of a hybrid position, but that negotiations aimed at obtaining a monetary settlement were still ongoing.

Mr. Llewellyn testified that since the union had failed to do anything for him, he had little confidence in their response. He therefore proceeded to file his complaint with the Board.

Mr. Morefesis, the union steward at the U.S. Northbound depot at the time of Mr. Llewellyn's lay-off, testified at the request of the complainant. He concurred with Mr. Llewellyn's views regarding the impropriety of his lay-off as well as his claim of a lack of representation. Mr. Morefesis confirmed that Mr. Maslen considered that the lay-off grievance had merit and would be brought to arbitration. However, he also testified that while the person hired to replace Mr. Llewellyn initially carried out the



same duties as the complainant, he subsequently assumed the pick-ups as well. As for the union's involvement, Mr. Morefesis stated that he had questioned Mr. Maslen about Mr. Llewellyn's case on three or four separate occasions. Mr. Maslen's response was that he was waiting for information he had requested from the company in order to verify the company's contention that it required a sorter/driver position. He also told Mr. Morefesis that he had been unable to reach the complainant.

### III

The Union outlined in its evidence the steps taken with respect to Mr. Llewellyn's grievances. Mr. Maslen, the recording secretary and business representative of Teamsters Local Union 938, indicated that he was familiar with the facts of the case.

He testified that he was advised that Mr. Llewellyn had been offered a sorter job at the Ontario Hub at the time of his lay-off. While Mr. Llewellyn could have worked at the Hub and maintained his grievances, Mr. Maslen admitted that this particular depot was a very undesirable place in which to work and that Mr. Llewellyn had no obligation to accept such a transfer. His advice, had he been asked, was that the decision was one for Mr. Llewellyn himself to make.

Mr. Maslen described the grievance procedure in effect. His involvement began, as in any other instance, after the complainant's grievances had been filed. He met with Mr. Llewellyn in the presence of his shop steward, Mr. Morefesis, prior to the grievance meeting to discuss the merits of the grievances. While he believed there was no valid reason for the lay-off, he told Mr. Llewellyn that the only way of attacking the company's decision was to show that the creation of the hybrid position was contrary to the collective agreement. As for the harassment grievance, after explaining the difficulty in succeeding with such a case, the complainant agreed that it be dropped.

Mr. Llewellyn attended the September 26th grievance meeting and was present when the harassment grievance was dropped. With respect to Mr. Llewellyn's lay-off, Mr. Maslen objected to the creation of a hybrid position and argued that since the Vistakon pick-up could be effected at regular times, the couriers returning to the depot could continue the practice of picking up the freight. There was therefore no valid reason for the lay-off. The company denied that pick-up times were consistent and maintained its position that it required a sorter/driver.

Mr. Maslen testified that he investigated the amount of driving time involved in the newly created position. He obtained the requisite information from management and verified it by speaking to Mr. Llewellyn's successor and by examining his time sheets. Based upon the amount of driving effected, he concluded that the company had, in fact, created a hybrid position. His evidence in this regard was corroborated by the complainant's replacement, Mr. Ali Dossa.

Mr. Maslen then contacted the stewards in the locals he serviced as well as all locals in other provinces covered by the same collective agreement in order to determine whether other hybrid positions existed in the Purolator system. In the interim, in order to preserve time limits, he advised the Director of Labour Relations, Mr. Steve Wuthman, of his investigation. The responses he obtained established that, while there were no hybrid positions within his locals, the use of hybrid positions was widespread elsewhere within the company.

In late February or March 1995, following his investigation, Mr. Maslen raised the issue of Mr. Llewellyn's grievance at a staff meeting of Local 938 attended by its executive officers and business agents. As no provisions in the collective agreement prohibited hybrid positions and as the practice was widespread in other local areas, there was a general consensus that the grievance would not be successful at arbitration.

Mr. Maslen denied he had promised Mr. Llewellyn he would arbitrate his grievance. Rather, he had told Mr. Llewellyn that he was prepared to go to arbitration contesting the creation of the hybrid position if he could prove that the establishment of such a position was contrary to the collective agreement. However, as a result of the opinion expressed at the staff meeting that a grievance would not succeed and his conclusion that a hybrid position had been established at the Northbound U.S. depot, he decided not to pursue the grievance.

Mr. Maslen also testified with respect to his contact with the complainant. He recalled having received only two recorded telephone messages from Mr. Llewellyn. He did speak to him after the grievance meeting and, during the course of that conversation, they both acknowledged their difficulty in reaching the other.

On July 12, 1995, Mr. Maslen received a phone message from Mr. Llewellyn stating that after one year, he would prefer to receive money. On the 26th of the same month, Mr. Maslen received a fax from Mr. Llewellyn referring to a job offer and stating that Mr. Llewellyn did not want his job back but rather sought compensation for the 10 months during which he had not worked.

Mr. Maslen contacted Ms. Harkonen of Human Resources with respect to the job but she had no knowledge that any position had been offered to the complainant. He then raised the question of a monetary settlement for Mr. Llewellyn. Ms. Harkonen categorically refused. Since Mr. Llewellyn had not accepted a position at the Ontario Hub, no settlement would be forthcoming. Mr. Maslen raised the issue with Ms. Harkonen a second time and also approached Mr. Wuthman for a monetary settlement on more than one occasion. His requests were refused.

In the fall of 1995, following receipt of a letter from Mr. Llewellyn's attorney, Mr. Maslen called him explaining what he had done and why he could not pursue the grievance regarding the complainant's lay-off. In concluding his testimony, he

conceded that he should have sent Mr. Llewellyn a letter advising him of the union's decision.

#### IV

Counsel for the employer raised the issue of the employer's status in the context of a section 37 complaint and requested the opportunity to cross-examine Mr. Llewellyn as well as his witness, Mr. Morefesis. The Board denied counsel's request.

A section 37 complaint is not directed against the employer but against the union. The employer's actions are not at issue and it has no case to defend. Strictly speaking, it is not a party to the proceedings as defined by the Code. The employer is nevertheless added as a party since its interests could be affected by the outcome of the complaint. In the event the Board upholds a complaint, the remedy ordered by the Board generally impacts not only on the union but on the employer as well. For this reason, the Board, in the interest of fairness, provides the employer with the opportunity of presenting its submissions on the question of remedy. On the other hand, its role with respect to the merits is restricted to that of an observer. (See André Gagnon (1986), 63 di 194 (CLRB no. 547); Gordon Newell (1987), 69 di 119 (CLRB no. 623); Cathy Miller (1991), 84 di 122 (CLRB no. 854); and Anne-Marie Rainville (1992), 88 di 30 (CLRB no. 936).)

The Board's decision to limit the role of the employer in this instance to the remedial aspects of the case is in keeping with the Board's practice.

#### V

The law regarding a trade union's discretion whether to process a grievance to arbitration is well settled. The principles that apply in the exercise of this discretion have been established by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509, as follows:



*"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*

- 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
- 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
- 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
- 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
- 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(page 527)

In the circumstances of this case, the Board is satisfied that the foregoing principles have been respected.

The essence of Mr. Llewellyn's complaint is his union's failure to proceed to arbitration. He considers that the union was negligent in not defending him with respect to his lay-off and that its decision not to contest the issue of the hybrid positions was arbitrary. He maintains that, since he has paid union dues, the union as his representative is required to challenge the creation of a hybrid position irrespective of how difficult that may be. To do otherwise, in his view, constitutes a lack of representation.

The complainant's position, while understandable, runs contrary to the case law on the duty of fair representation. It is well established that an employee does not have an absolute right to arbitration. In this regard the union has a considerable amount of discretion. As the Board stated in Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRBR no. 550):

*"... the union does not have to take every grievance it presents at step 1 to the ultimate step, that is arbitration, provided it has fulfilled its obligation to the best of its ability in studying the grievance, and has come to the honest conclusion that there is no merit in taking the matter to arbitration."*

(pages 226; 255-256; and 14,101)

The Board examines therefore whether the union, in deciding not to proceed with a grievance, has thoroughly considered the merits of the case and has not exercised its authority unfairly or in a manner that is discriminatory or in bad faith. The Board on numerous occasions has stated that it will not second-guess the union's decision not to proceed to arbitration. (See Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRBR no. 304); Y.B. Poon et al. (1990), 79 di 156; and 90 CLLC 16,011 (CLRBR no. 776); and David Coull (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRBR no. 957); and Gino Giammarino (1993), 93 di 145 (CLRBR no. 1047).) Similarly, the Board does not assume the role of an arbitrator in determining the validity of a grievance. Its focus is on the union's conduct and attitude in examining the matter. Key considerations include how union officers viewed the grievance, how they dealt with the grievor, what efforts were made to obtain the relevant facts, the conclusions reached and the motives for not proceeding with a grievance. (See David Coull, *supra*.)

In the present case, Mr. Maslen first met with Mr. Llewellyn in preparation for the formal grievance meeting. It was decided, with Mr. Llewellyn's consent, to drop the harassment grievance. As for the grievance contesting the lay-off, Mr. Maslen carried out an investigation both with respect to the work actually performed by

Mr. Llewellyn's successor and with respect to the use of hybrid positions elsewhere in the system. He requested and obtained documentation from the company concerning the alleged changes to Mr. Llewellyn's job and verified the accuracy of the information received with the incumbent. Having determined that a hybrid position had been created, he inquired into the implementation of such positions at other depots. He then brought Mr. Llewellyn's grievance to a union staff meeting for discussion. Based upon his investigation and the opinion that the grievance had little chance of succeeding at arbitration, the union decided not to pursue it further. Mr. Maslen nevertheless attempted to obtain a monetary settlement for Mr. Llewellyn.

Taking all the foregoing into consideration, the Board concludes that the union acted within the bounds of its lawful discretion when it decided not to process the grievance to arbitration.

Any reproach that may be made against the union relates to its lack of communication with Mr. Llewellyn throughout its investigation and particularly once it had decided not to pursue the grievance. Had the union shown more diligence in keeping the complainant informed, it is unlikely that the present complaint would have been filed. The Board has noted, however, that when contacted by the complainant's counsel, Mr. Maslen responded immediately, setting out the steps he had taken. Moreover, following this telephone conversation, Mr. Llewellyn's counsel recommended that Mr. Llewellyn allow Mr. Maslen to complete his efforts to obtain a monetary settlement before considering other options. The Board is satisfied that there was no bad faith on the part of the union and its efforts to resolve Mr. Llewellyn's grievance were genuine.

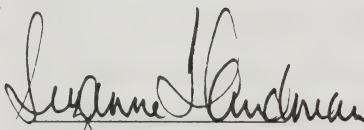
Having concluded that section 37 of the Code was not violated, the issue of timeliness raised by the union need not be addressed.

VI

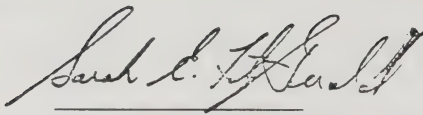
The Board wishes to comment on one further issue. At the hearing, Mr. Llewellyn expressed his concerns about appearing before the Board and presenting his case without the assistance of legal counsel. He reiterated his concerns in his written submissions, stating that he was at an unfair advantage vis-à-vis the union because he lacked the necessary resources, experience and legal knowledge required to defend his case.

In this instance, the complainant was assisted by the Board during the course of the hearing, as the Board usually does in such cases. In determining the complaint, all the allegations raised by Mr. Llewellyn were taken into account. In sum, the outcome of the case cannot be attributed to the lack of legal representation. The relevant facts which were satisfactorily proven by Mr. Llewellyn simply did not establish a breach of the Code.

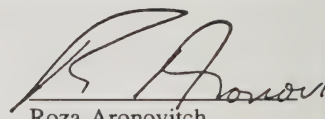
Accordingly, the complaint is dismissed.



Suzanne Handman  
Vice-Chair



Sarah E. FitzGerald  
Member



Roza Aronovitch  
Member



# information

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## Summary

Mr. Clifford Turner, *complainant*, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *respondent*, and VIA Rail Canada Inc., *employer*.

Board File: 745-5227  
CLR/CCRT Decision no. 1194  
January 6, 1997

## Résumé

M. Clifford Turner, *plaignant*, Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada), *intimé*, et VIA Rail Canada Inc., *employeur*.

Dossier du Conseil: 745-5227  
CLR/CCRT Décision n° 1194  
le 6 janvier 1997

The complainant, Mr. Clifford Turner, alleged that the National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada) breached its duty of fair representation by not grieving a disputed severance payment and by accepting an inadequate settlement without his consent.

Having considered the evidence, the Board concluded that the complaint was untimely. Following an investigation of Mr. Turner's complaint, the Union concluded that while he was entitled to less than colleagues in another unit, Mr. Turner had nevertheless received his rightful severance, there being no violation of the terms of the applicable buyout agreement by the employer. By April 1995, the Union had also, through its efforts, secured an *ex gratia* payment from VIA Rail of an additional \$5,000. Having thus exhausted all of its efforts on Mr. Turner's behalf, it advised the complainant in April 1995 that the Union would proceed no further with his complaint. Mr. Turner however did not lodge his complaint with the Board until after the Quebec Superior Court had declined

Le plaignant, M. Clifford Turner, allègue que le Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada) a manqué à son devoir de représentation juste en ne présentant pas de grief au sujet d'une indemnité de départ contestée et en acceptant sans son consentement un règlement insuffisant.

Après examen de la preuve, le Conseil en arrive à la conclusion que la plainte a été déposée en dehors des délais prescrits. À la suite d'une enquête à l'égard de la plainte de M. Turner, le syndicat a conclu que, même si le plaignant avait droit à une indemnité inférieure à celle qu'avaient touchée ses collègues d'une autre unité, M. Turner avait reçu l'indemnité de départ qui lui était due, puisque l'employeur n'avait pas violé les modalités de l'entente de mise à la retraite avec prime en question. En avril 1995, le syndicat avait, par ses propres efforts, obtenu de VIA Rail une allocation forfaitaire d'une somme additionnelle de 5 000 \$. Ayant fait tous les efforts possibles au nom de M. Turner, il a informé le plaignant en avril 1995 que le syndicat ne donnerait pas suite à

jurisdiction in November 1995. The Board found no evidence that any union official had either counselled or encouraged the complainant to commence court action.

The Board also rejected the argument that an ongoing breach of section 37 may be implied from a union's continued refusal to file a grievance. The decision not to proceed with the complainant's claim having been clearly communicated to him, repeated refusals cannot be imputed to the union thereafter simply because it retained the discretion to submit a grievance and chose not to do so. To find otherwise would deprive a Union of any finality in its decision-making.

As to the substance of the complainant's allegations, had the Board found the complaint to be timely, it would have also concluded that it was unfounded on its merits. Having determined that there was no breach of the buyout agreement, the Union did not have to grieve the matter provided it accorded the complaint due consideration and in so doing acted without arbitrariness, discrimination or bad faith.

sa plainte. La Cour supérieure du Québec s'étant déclarée incompétente en novembre 1995, M. Turner a ensuite déposé sa plainte auprès du Conseil. Le Conseil estime qu'il n'a pas été établi en preuve qu'un dirigeant syndical avait conseillé au plaignant d'intenter une poursuite en justice ou qu'il l'avait incité à le faire.

En outre, le Conseil rejette l'argument selon lequel il découle du refus continu de déposer un grief qu'il y a eu violation continue de l'article 37. La décision de ne pas donner suite au grief ayant été clairement transmise au plaignant, des refus répétés ne peuvent être attribués au syndicat par la suite simplement parce que ce dernier se réservait le droit de déposer un grief, mais ne l'avait pas fait. Tirer une autre conclusion priverait le syndicat du caractère définitif du processus de prise de décisions.

Quant au fond des allégations formulées dans la plainte, si le Conseil avait jugé que la plainte avait été déposée dans les délais prescrits, il aurait également conclu que la plainte n'était pas fondée. Ayant établi qu'il n'y avait pas eu violation de l'entente de mise à la retraite avec prime, le syndicat n'était pas tenu de déposer un grief pourvu qu'il ait dûment examiné la plainte et que, ce faisant, il n'ait pas agi de façon arbitraire, discriminatoire ou de mauvaise foi.

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## Reasons for decision

Clifford Turner,

*complainant,*

*and*

National Automobile, Aerospace,  
Transportation and General Workers Union of  
Canada (CAW-Canada),

*respondent,*

*and*

VIA Rail Canada Inc.,

*employer.*

Board File: 745-5227  
CLR/CCRT Decision no. 1194  
January 6, 1997

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The Board was composed of Ms. Suzanne Handman, Vice-Chair and Ms. Véronique L. Marleau and Ms. Roza Aronovitch, Members. A hearing was held on July 17-19, 1996 and on August 2, 1996, at Montréal.

### Appearances

Mr. Donal Archambault, counsel, accompanied by Mr. Larry Turner; for the complainant; and

Mr. Abe Rosner, National Representative, accompanied by Mr. John Moore-Gough, President, Local 100, for the respondent.

These reasons for decision were written by Ms. Roza Aronovitch, Member.



## I

These reasons for decision deal with a complaint filed by Clifford Turner with the Board, on November 21, 1995, alleging that the National Automobile, Aerospace, Transportation and General Workers of Canada (CAW or the Union) breached its duty of fair representation by not pursuing his grievance to arbitration and by accepting an inadequate settlement without his consent.

## II

In December 1994, as a result of the elimination of certain positions, a memorandum of agreement was entered into by the CAW Rail Division, Local 100, and VIA Rail Canada Inc. (VIA) providing "special severance opportunities" or buyouts to shopcraft employees. Accordingly, Mr. Turner, a coach cleaner and shopcraft employee received a notice of buyout with an attachment addressed to employees covered by CAW Rail Division, Local 100 (shopcraft agreement). The attachment indicated that the amount being offered was \$2,000 for every year of service, up to a maximum of \$50,000 with the following statement:

*"...Should an employee's earnings to age 65 be less than the \$50,000 maximum, the severance amount will be limited to an amount equal to such earnings plus a special incentive amount of 25%."*

At the time of the offer, Mr. Turner was approaching 65 and, as of the effective date of the buyout, namely January 31, 1995, he would have been roughly eight weeks from his mandatory retirement date in March 1995. Having considered the offer, Mr. Turner recognized an opportunity to retire eight weeks early and applied for the buyout package. He was aware that employees from Lodge 341 "CBRT & GW" (the CBRT employees), a bargaining unit separate from the shopcraft employees but also represented by CAW, had also been offered a buyout. Indeed, Mr. Turner's notice stated that the CBRT employees had already received their offer.



On January 9, 1995, VIA sent Mr. Turner a letter that approved his application for a buyout. It indicated a termination date of January 31, 1995 and a severance entitlement of \$6,146.54. Mr. Turner was requested to sign and return this letter no later than January 13, 1995 or be deemed not to have accepted the offer. Mr. Turner was aware that some CBRT employees approaching 65 had retired with payments of \$50,000. While he was dissatisfied with his severance, he wished to remain eligible for the buyout and therefore signed and returned the letter with the following paragraph which he added in his own handwriting:

*"As we must sign this agreement by January 13, 1995, I'm signing the same to ensure that I am eligible for the separation package, however, I reserve the right to contest the provisions of the agreement signed by the CAW for the shopcrafts in lieu of the CBRT agreement."*

(emphasis added)

Mr. Turner then spoke to his Local Chairman, Mr. Jean-Claude Sauvé, to complain of the amount he had accepted. Mr. Sauvé indicated that he could do nothing for Mr. Turner and instead referred him to Mr. John Brady, CAW National Representative. Mr. Turner knew Mr. Brady and, having been referred to him tried to contact him first by phone. Following a couple of unsuccessful attempts, he made an appointment to see Mr. Brady at his downtown office on January 16, 1995. At that meeting Mr. Turner complained of the amount of the buyout and recalled that during the ensuing discussion, Mr. Brady said that he was aware of the issue and had filed a grievance on Mr. Turner's behalf. Subsequently, having looked for and not found a copy of the grievance, Mr. Brady undertook to send one to Mr. Turner at a later date.

By February 14, Mr. Turner had not received any documentation from Mr. Brady, nor had any further communication with him other than a short brush at Mr. Turner's retirement party. As a result, he contacted Mr. John Moore-Gough, the President of Local 100. Mr. Moore-Gough knew of the circumstances that had given rise to Mr. Turner's complaint, but explained to Mr. Turner that he had received all he was

entitled to under the shopcraft agreement. Mr. Moore-Gough was aware that certain CBRT employees approaching 65 had received \$50,000; however this was pursuant to a separate buyout agreement with VIA which was negotiated prior to the shopcraft agreement and more importantly did not contain the above-mentioned provision limiting the severance entitlement of those accepting a buyout close to their 65th birthday.

Mr. Moore-Gough advised Mr. Turner that Mr. Tom Woods, the Union's negotiator and signatory to the shopcraft agreement, was arranging a meeting with VIA and would try to get more money for the Local 100 employees affected by the cap, including Mr. Turner. He was surprised that Mr. Turner had not heard from or received anything from Mr. Brady and said that a letter from Mr. Woods to VIA would be forwarded to him. To put the matter in context, the letter referred to by Mr. Moore-Gough provided the background of the negotiations of the buyout agreement. In the letter, (exhibit R-5) Mr. Woods chastises VIA for providing him with erroneous information during the negotiation of the shopcraft agreement. The misinformation from the employer led to the inclusion of a cap in the shopcraft agreement which was absent from the CBRT buyout, such that CBRT employees retiring close to 65 would receive their full \$50,000 while shopcraft employees in the same circumstances were entitled to the remainder of their salary to age 65 plus 25%. The letter, written by Mr. Woods in anticipation of the upcoming meeting with VIA, requested the employer to adjust the buyouts of the shopcraft employees close to retirement who had had their severances capped.

Mr. Turner asked to be kept informed of the outcome of the discussions between Mr. Woods and VIA. He claims however, to have received nothing more from either Mr. Brady or Mr. Moore-Gough until the end of March or beginning of April, at which time Mr. Moore-Gough got in touch with Mr. Turner by phone. He informed Mr. Turner that Mr. Woods had met with VIA representatives who had agreed to authorize the payment of an additional \$5,000 to Mr. Turner and another shopcraft colleague who had retired early in similar circumstances. Mr. Turner refused the offer

colleague who had retired early in similar circumstances. Mr. Turner refused the offer stating that he was entitled to much more than the \$11,000 which VIA was prepared to pay and told Mr. Moore-Gough that he was prepared to take the matter to court. In point of fact, in June 1995 he instituted proceedings against VIA in Quebec Superior Court. The Board was advised that the Court declined jurisdiction on November 8, 1995; Mr. Turner then filed his complaint with the Board on November 17, 1995.

In essence, Mr. Turner alleges that the Union did nothing to advance his claim, vis-à-vis the employer, thereby breaching section 37 of the Code. He contends that the Union ought to have referred his complaint to arbitration. In addition, he complains of the Union's lack of communication and denies ever having received any correspondence from either Messrs. Brady or Moore-Gough, be it a copy of the promised grievance or the Woods letter. Having kept him in the dark and without assistance through much of the time, the Union had then agreed to an inadequate settlement on his behalf without his consent.

The Union, for its part, claims that Mr. Turner's complaint is both untimely and without merit. It acknowledges that no grievance was filed on Mr. Turner's behalf but takes the position that it was not appropriate to do so, as the employer had not made an error in calculating the amount due to Mr. Turner. Whatever the terms of the buyout agreement, Mr. Turner had received the correct amount in accordance with those terms. As the complainant's claim was not grievable, the Union further argues that it has achieved the best result it could on Mr. Turner's behalf by negotiating an ex gratia payment of \$5,000 on the basis of the inequity to shopcraft retirees as compared with their CBRT colleagues.

The ex gratia payment was negotiated in March 1995 and according to its terms, Mr. Turner and another affected colleague were to be paid \$5,000 by VIA "in full and final settlement of the matter". Mr. Moore-Gough testified that to his knowledge, VIA had reoffered the money to Mr. Turner following his Court action against VIA

on condition that Mr. Turner withdraw his complaint against the Union. Mr. Moore-Gough made clear that in his view, Mr. Turner was entitled to the money. If Mr. Turner advised him that he wished to be paid the \$5,000, Mr. Moore-Gough would personally request VIA to pay the sum to him without condition.

### III

#### Timeliness

The Union took the position that the complaint was untimely since Mr. Turner was advised on February 14, 1995 and again not later than April 4, 1995 by Mr. Moore-Gough that the Union had no intention of pursuing the matter further and that the settlement reached on March 17, 1995 with respect to the additional \$5,000 was final. Having filed his complaint on November 17, 1995, Mr. Turner was clearly outside the time limits prescribed.

In the first instance, counsel for the complainant argued that Mr. Turner was encouraged to seek legal redress at Court and that the Union is therefore estopped from objecting to the timeliness of the complaint. He argued that, as of October 1995, Mr. Moore-Gough maintained in correspondence to Mr. Turner's counsel that the buyout agreement did not form part of the collective agreement. Indeed it was only at the hearing that Mr. Moore-Gough acknowledged that the issues arising out of the buyout agreement could be grieved. As of October 1995 however, the clear implication to be drawn from the Union's refusal to acknowledge that the buyout was part of the collective agreement was that Mr. Turner's only recourse was to the courts. It was argued that Mr. Turner would have been precluded from proceeding against the Union until the arbitrability of the complaint was established, which, according to counsel for the complainant, occurred when the Superior Court declined jurisdiction. Mr. Turner's complaint was therefore timely as it was filed well within 90 days from that date.



Counsel's second argument was based on the Union's refusal to file a grievance, despite Mr. Moore-Gough's acknowledgement at the hearing that matters arising out of the buyout agreement could be grieved and that such a grievance would still be timely. Counsel argued that the complaint could not be time-barred while the grievance itself is not. He imputed to the Union a daily refusal to file a grievance resulting in an ongoing breach of the duty under section 37 of the Code.

The Supreme Court in Upper Lakes Shipping Ltd. v. Mike Sheehan et al. [1979] 1 S.C.R. 902, has ruled that the Board does not have discretion to enlarge or abridge the time limits imposed by section 97(2) of the Code which requires that a complaint be made 90 days from the date on which the complainant knew of the conduct on which he bases his claim. Having said that, it is of the Board's discretion to determine when the complainant "knew or ... ought to have known of the action or circumstances giving rise to the claim".

Having heard the testimony of the parties, the Board concludes that the complaint is indeed untimely. Mr. Turner, of his own admission, was not at any time encouraged or advised by Mr. Moore-Gough or by any other Union representative to seek an alternate forum or to institute proceedings against VIA. Mr. Moore-Gough clearly advised Mr. Turner that it was his choice whether to take the matter to court. Considering Mr. Turner's own evidence in this regard, we are satisfied that as of April 4, 1995, Mr. Moore-Gough had communicated unequivocally to the complainant, and that Mr. Turner understood that the Union would not proceed further with his complaint.

As to the argument of an ongoing breach, we cannot accept that a continuous or ongoing refusal or breach may be implied from the length of the period during which a grievance may be filed. The decision not to proceed with Mr. Turner's claim having been clearly communicated to the complainant, repeated refusals cannot be imputed to the Union thereafter simply because the Union retained the discretion to submit a grievance and chose not to do so. To find otherwise would deprive the Union

of any finality in its decision making. In any case, it would not affect the Board's determination as to when the complainant knew or ought to have known of the circumstances giving rise to his complaint.

#### IV

Having regard to the substance of Mr. Turner's allegations, had the Board found the complaint to be timely, it would also have concluded that the complaint was unfounded on its merits for the following reasons.

In his final argument, counsel for Mr. Turner provided an interpretation of the early retirement offer, including the language of the cap, which in his view would have yielded some \$69,000 to Mr. Turner. Not only had the Union misled Mr. Turner about having filed a grievance on his behalf, it had also arbitrarily denied him the opportunity to have the meaning of the limitation clause in the buyout agreement submitted to arbitration. Counsel took issue with the Union's "arrogance" in stating categorically that there could not be any alternate interpretation of the problematic cap provision and in stating that it was the Union's sole prerogative to decide whether to grieve a particular complaint.

Having heard the evidence, it is clear that Mr. Turner's dissatisfaction with his severance was not due to his erroneous interpretation of the settlement offer or indeed to what he took to be its misinterpretation by the employer. His dissatisfaction was due to not having received the \$50,000 given to his CBRT brethren. The evidence adduced by Messrs. Brady, Moore-Gough and Turner is consistent in this regard. In each of their encounters and conversations, Mr. Turner asserted his entitlement to the \$50,000 allotted to his colleagues of similar age. He complained to both Messrs. Brady and Moore-Gough that he had not received the same treatment as his CBRT colleagues. Indeed, this is fully borne out by the comment he wrote in protest on his acceptance form, which is reproduced above. His intention was "to contest the provisions of the agreement signed by the CAW for the shopcrafts in lieu of the

CBRT agreement". This he did consistently with both Messrs. Brady and Moore-Gough.

The evidence indicates that at some point, perhaps at the time he instituted proceedings in Superior Court, he became persuaded that he was entitled to an amount in excess of \$50,000. However, there was no evidence to suggest that these amounts were raised with either Messrs. Brady or Moore-Gough.

As to the grievance, we accept Mr. Brady's evidence that Mr. Turner did not ask him to file a grievance and that, at no time did Mr. Brady advise Mr. Turner that he would file a grievance on his behalf. To the contrary, it seems clear that both Messrs. Brady and Moore-Gough were clearly of the view that the matter was not grievable. If either a grievance or the grievability of his claim were of concern to Mr. Turner, he certainly did not indicate this to Mr. Moore-Gough or ever discuss it with him. Having said that, Mr. Brady recalls clearly undertaking to investigate Mr. Turner's complaint which he in fact did both with Messrs. Woods and Moore-Gough. It would appear that the only documentation which Mr. Turner expected from Mr. Brady of which he incidentally informed Mr. Moore-Gough, was not a grievance but rather a copy of exhibit R-5, the Woods letter to VIA. While Mr. Turner did not recall receiving any copies of the letter in question, we conclude from the record and the testimony of the witnesses that the letter was sent to Mr. Turner by each of Messrs. Brady and Moore-Gough and that Mr. Turner was in receipt of at least one copy.

The Board has consistently taken the position that the interpretation of collective agreements or related negotiated documents is a matter for the parties to the agreement providing, always, that the Union act in a manner that is not arbitrary, discriminatory or in bad faith. We find no evidence to suggest that the Union's conduct was remiss in this regard. Similarly, in the circumstances of this case, the Union's refusal to grieve Mr. Turner's complaint does not breach the duty of fair representation. Section 37 of the Code does not provide an individual with an

absolute right to arbitration nor does it compel unions to grieve all complaints they receive. Unions retain considerable discretion in this regard but must, in good faith, give due and thoughtful consideration to the merits of a complaint or grievance in its investigation and disposition. (Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509 page 527).


In the instant case, three of the Union's most senior officers were involved in the investigation and resolution of Mr. Turner's complaint. Notwithstanding Mr. Turner's recollection of events, which by his own admission was uncertain in some regards, the evidence indicates that Messrs. Brady and Moore-Gough did inform and communicate with Mr. Turner in a timely manner. They were consistent in the position they maintained throughout to the effect that there was no breach of the buyout agreement by the employer. They held discussions at senior levels of VIA in order to increase the amount paid to Mr. Turner. There is no evidence of conduct that is arbitrary, discriminatory or in bad faith.

As to the \$5,000, which VIA had accepted to pay to Mr. Turner, it was an ex gratia payment negotiated by the Union. The Union may, in any case, have been justified in agreeing to the amount if it could not by other means achieve a better result for its member with respect to a grievance. This however was not such a case since the Union had already decided that Mr. Turner did not have a valid grievance. It was therefore not dealing with a grievance as such and cannot be faulted for attempting to augment Mr. Turner's severance.

The Union's failure in this case is that it did not achieve the results Mr. Turner wished. Such is not however the Union's obligation pursuant to its duty of fair



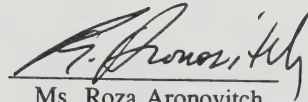
representation. Accordingly, the Board would have concluded that the Union did not violate section 37 of the Code, and dismissed Mr. Turner's complaint on the merits.



Ms. Suzanne Handman  
Vice-Chair



Ms. Véronique L. Marleau  
Member



Ms. Roza Aronovitch  
Member



# information

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## Summary

Radiomédia Inc., and Les Entreprises de Radiodiffusion de la Capitale Inc., division CHRC-CHOI-FM, *applicants*, and Syndicat des employés de CHRC et CHOI-FM, Local 2645 of the Canadian Union of Public Employees, *certified bargaining agent*.

Board Files: 530-2560; 530-2561; 585-620

CCRT/CLRB Decision no. 1195

February 7, 1997

Applications pursuant to section 18 of the Code, seeking amendment of the certification order to change the name of the employer to reflect the situation arising from a partial sale of business that occurred on September 30, 1994.

The applications are allowed. The Board concludes that part of business was in fact sold in the present case and that, contrary to the bargaining agent's claim, the applications' real intent is not to break up the existing bargaining unit, but to regularize a de facto situation. In this regard, the Board stresses that the splitting up of the bargaining unit that ensues from the sale of part of the business does not, of itself, determine which employees may, at each employer, have rights under the collective agreement which, thereafter, binds both the seller and the buyer. Such rights under the said collective agreement must, if necessary, be determined by an arbitrator, not by the Board.

## Résumé

Radiomédia Inc., et Les Entreprises de Radiodiffusion de la Capitale Inc., division CHRC-CHOI-FM, *requérantes*, et Syndicat des employés de CHRC et CHOI-FM, section locale 2645 du Syndicat canadien de la fonction publique, *agent négociateur accrédité*.

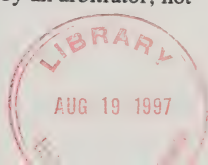
Dossiers du Conseil: 530-2560; 530-2561;  
585-620

CCRT/CLRB Décision n° 1195

le 7 février 1997

Demandes fondées sur l'article 18 du Code en vue de modifier l'ordonnance d'accréditation pour y changer la désignation de l'employeur de manière à refléter la situation découlant de la vente partielle de l'entreprise survenue le 30 septembre 1994.

Les demandes sont accueillies. Le Conseil conclut qu'il y a bien eu vente de partie d'entreprise en l'espèce et que, contrairement à la prétention de l'agent négociateur accrédité, le but réel des demandes n'est pas de fragmenter l'unité de négociation existante, mais bien de régulariser une situation de fait. A cet égard, le Conseil souligne que la scission de l'unité de négociation qui découle de la vente d'une partie d'entreprise n'a pas en elle-même l'effet de déterminer quels sont les employés qui peuvent, chez chacun des employeurs, avoir des droits en vertu de la convention collective qui lie maintenant et le vendeur et l'acquéreur. Ces droits qui découlent de ladite convention collective doivent, s'il y a lieu, être déterminés par un arbitre et non par le Conseil.



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## Reasons for decision

Radiomédia Inc.,

*and*

Les Entreprises de Radiodiffusion de la Capitale  
Inc., CHRC-CHOI-FM division,

*applicants,*

*and*

Syndicat des employés de CHRC et CHOI-FM,  
Local 2645 of the Canadian Union of Public  
Employees,

*certified bargaining agent.*

Board Files: 530-2560; 530-2561;  
585-620

CCRT/CLRB Decision no. 1195  
February 7, 1997

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The Board was composed of J. Philippe Morneau, Vice-Chair, and Véronique L. Marleau and Roza Aronovitch, Members. A hearing was held in Quebec City on October 9, 10 and 11, 1996.

### Appearances

Mr. Robert Dupont, Counsel (Heenan Blaikie), accompanied by Mr. Richard Forand, general manager of Radiomédia Inc., for the applicants; and

Mr. Sylvain Seney, Counsel (Trudel Nadeau), accompanied by Mr. Paul Ouellette, President, local 2645, for the union.

The reasons for decision were written by Véronique L. Marleau, Member.

I

The Applications

The Board was seized with two applications filed under section 18 of the Canada Labour Code by Les Entreprises de Radiodiffusion de la Capitale Inc. ("ERC"), on the one hand, and by Radiomédia Inc. ("Radiomédia"), on the other (hereinafter "the applicants"). The applicants allege that a sale of a part of a business within the meaning of the Code occurred when ERC sold Quebec City radio station CHRC-AM to Radiomédia on September 30, 1994 while retaining ownership of and continuing to operate Quebec City station CHOI-FM. Consequently, the applicants are asking the Board to amend the certification order covering ERC's employees so that it reflects this new situation: in Radiomédia's case, the bargaining certificate is to be amended to refer only to the employees of CHRC-AM and, in ERC's case, to refer only to the employees of CHOI-FM.

The certified bargaining agent, the Syndicat des employés de CHRC et CHOI-FM, local 2645 of the Canadian Union of Public Employees ("the union"), is objecting to these applications. First, the union denies that there was a sale of business within the meaning of the Code and, second, it maintains that, if the Board concludes that a sale has in fact occurred, it must nonetheless dismiss the applicants' request because its real objective is not to formalize a situation, but rather to fragment the existing bargaining unit by causing it to split up, an outcome which would clearly be contrary to the Board's policy on such cases.

The union had admitted that a sale had occurred until the day before the hearing. However, invoking the recent discovery of new evidence (including a group master agreement dated September 15, 1994 between Radiomutuel and Télémédia and a memorandum dated September 30, 1994 submitted by the Radiomédia partnership to the CRTC), the union requested the Board's permission to withdraw the admissions pertaining to this matter. Counsel for the applicants objected to this request on the

ground that it was contrary to the rules of evidence and that it could cause them prejudice given the advanced stage of the case.

After hearing the parties on this matter, the Board decided to grant the request of counsel for the union. The Board permitted counsel for the union to withdraw his admissions concerning the occurrence of the sale and to file the said "new evidence" so as to be able to draw arguments from it on the issue of the non-occurrence of a sale of business in the instant case. However, in view of the prejudice the filing of his evidence could cause counsel for the applicants, the Board informed the parties that in its view the case as established already showed that a sale had occurred within the meaning of the Code and that, in the circumstances, the new evidence which counsel for the union intended to file would have to be submitted in such a way as to rebut this *prima facie* evidence.

## II

### Background

By an order dated May 17, 1982 (file 555-1735), the Board certified the union as the bargaining agent for a unit comprised of all employees of Entreprises Télé-Capitale Ltée. In 1984, the name "Entreprises Télé-Capitale Ltée" was changed to "Les Entreprises de Radiodiffusion de la Capitale Inc." ("ERC") and, by an order dated March 25, 1986, the Board amended the certification order of May 17, 1982 to reflect this amendment; that is, the employer's name was replaced with "Les Entreprises de Radiodiffusion de la Capitale Inc., "Division CHRC-CHOI-FM"". Thus, when the present applications were filed, the description of the bargaining unit which was the subject of a certification order at ERC was as follows:

*"All employees of Les Entreprises de Radiodiffusion de la Capitale Inc., 'Division CHRC-CHOI-FM', excluding general manager - CHRC, general manager - CHOI, and their respective secretaries, public relations manager for CHRC and CHOI, programs manager -*

*CHRC, programs manager - CHOI, director of information - CHRC and CHOI, sports director - CHRC and CHOI, technical director - CHRC and CHOI, director of personnel, credit and auditing - CHRC and CHOI, and his secretary, promotions director - CHRC and CHOI, artistic director - CHOI, production director - CHOI, sales manager - CHRC, sales manager - CHOI, sales representatives - CHOI, freelancers working for CHRC and CHOI."*

On September 15, 1994, Radiomutuel Inc. ("Radiomutuel") and Télémedia Communication Inc. ("Télémedia") entered into a group master agreement. The purpose of this agreement was to restructure the AM radio stations businesses in Quebec by combining their strengths and their resources to enable them to operate as a network. This new AM network was to include CKAC in Montreal and CHRC in Quebec City, which, although operated by distinct legal entities, are held and controlled equally by Télémedia and Radiomutuel. As a result of the restructuring of Radiomutuel's and Télémedia's AM stations, the operations of CJMS in Montreal and CJRP in Quebec City ceased and their licences were returned by their owner, Radiomutuel.

On September 30, 1994, as part of this restructuring project, ERC, which at that time owned and operated Quebec City stations CHRC-AM and CHOI-FM, sold CHRC-AM to Radiomédia. The same day, Radiomédia asked the CRTC to issue it a licence to operate Quebec City station CHRC-AM. Radiomédia has operated CHRC-AM since that time. ERC, on the other hand, retained ownership of CHOI-FM and continued operating it at the same premises. This station was placed under trusteeship at the CRTC's request to ensure its separateness from CITF-FM. This station belonged to Télémedia, which had also become the sole shareholder of ERC, which operated CHOI-FM.



### III

#### Evidence

The union filed in evidence several documents - agreements, briefs, deeds - reflecting the terms and conditions of the transactions that had taken place between the applicants or between legal entities related to them.

On the management side, in addition to the contract for the sale of assets between ERC and Radiomédia dated September 30, 1994 and signed by Claude Beaudoin, the CRTC decision of March 27, 1995 authorizing the transfer of control and assets from ERC's CHRC to Radiomédia, and that of March 27, 1995 authorizing the renewal of CHOI-FM's licence, held by ERC (already on file), the Board received the testimony of four persons as well as a number of related documents.

Patrice Demers, CHOI-FM's general manager, stated at the outset that he had been a party to the discussions leading to the conclusion of the transaction at issue in the instant case, that is, the sale of CHRC-AM by ERC to Radiomédia. He explained the financing terms for the \$2 million transaction. He was questioned during cross-examination about the identity of the shareholders of the applicant Radiomédia. Mr. Demers explained that 50 percent was held by Télémedia and 50 percent by Radiomutuel and that the investment of each of the two parties in the transaction at issue - the amount each partner had put into the corporation's capital stock - was \$1 million. On this point, proof of payment was provided to the Board. Mr. Demers also explained that some of the transactions relating to the sale of the station itself had proven necessary to bring the situation in line with the conditions imposed by the CRTC when the operating licences were issued.

Before becoming general manager of CHOI-FM on July 2, 1996, Mr. Demers was one of Télémedia's Vice-Presidents. On this point, Mr. Demers confirmed that

Télémedia had held all of ERC's shares since September 1994 and that ERC had been placed under its management during the transactions of September 1994.

In cross-examination, Mr. Demers admitted that there may have been certain exchange of services agreements between CHOI and CHRC, but he indicated that the station obtaining the services in question was invoiced by the other station.

The Board then heard the testimony of Mr. Raynald Brière. Mr. Brière, who served as Vice-President of Radiomédia Inc. and general manager of CKAC-AM in Montreal, was previously general manager of Radiomutuel Inc., which operated CJMS-AM in Montreal. Mr. Brière explained to the Board the context of the transaction in question - the difficulties the AM radio was experiencing - and emphasized that the restructuring of the AM radio was the outcome of this situation. Essentially, the external market could not support that many radio stations. This restructuring, implemented in September 1994, thus marked the culmination of a major reform crystallized by the creation of Radiomédia and the closing of a number of stations and ensuing layoffs. The final decision as to which stations would continue to be operated was made on the basis of their frequency, that is, their listening area.

Mr. Brière explained that this was the context within which Radiomédia acquired the Quebec City station CHRC-AM. The station's management and image has of course changed since 1994, but the station remained in the same building and kept the same on-air and other staff. Essentially, the station continued being operated as previously.

Mr. Brière confirmed to the Board that Radiomutuel owned 50 percent of Radiomédia, as well as being the sole owner of an AM network made up of two stations and holding over seven FM stations. After emphasizing the fierce competition radio broadcasters in Quebec have to contend with as a result of the fairly limited market, Mr. Brière gave an overview of the business arrangements that had been entered into in order to continue operating certain radio stations in Quebec. This testimony revealed that, from a commercial standpoint, radio broadcasters ultimately share the

same overall concerns, their real competitor now being television. Hence the tendency to centralize power despite the fact that radio ultimately has to reflect the community it serves.

Mr. Brière indicated that he was not a member of ERC's board of directors and was not involved in any way in managing CHOI-FM. Consequently, he knew nothing about CHOI-FM's business plan. As to Radiomutuel's strategic orientations, Mr. Brière noted that, as one of the three members of the executive committee which monitors the two AM stations and prepares financial updates, it went without saying that he did not provide such information to a competitor, in this case CHOI-FM.

That being said, Mr. Brière noted that there was a collaborative relationship between all Quebec stations, and also with certain other affiliated stations. This information sharing network had started in 1972, which meant that the relationship had been in existence for 25 years. Furthermore, Mr. Brière admitted there were certain business ties between the stations as far as products were concerned: certain radio broadcasting products which do not have an intrinsically local character, such as baseball and national news, could be sold to a number of stations or broadcast over the entire network. Mr. Brière described the CHRC-AM management team and noted that its members were employed exclusively by that station and were in no way involved in CHOI-FM.

The Board then heard from Mr. Richard Forand, general manager of CHRC-AM, whose immediate supervisor is Mr. Raynald Brière. Mr. Forand, who has been responsible for the station's general management and for staff relations, stated that, since September 30, 1994, the date on which CHRC-AM was acquired by Radiomédia, operations had continued as they had previously. Following up on what Mr. Brière had said, Mr. Forand emphasized that he was not involved in any way in CHOI-FM's management, whether it be managing the day-to-day operations or developing its strategic orientations or its business plan. Mr. Forand confirmed the list of members of CHRC's management team as presented by Mr. Brière and

reiterated that neither of them was involved in any way in managing CHOI, in determining its strategic orientations or in developing its business plan, and that the same was true of CHOI's management team with regard to managing CHRC.

Mr. Forand stated, however, that CHRC had entered into an agreement with CHOI-FM on September 30, 1994 to provide news for an annual lump-sum fee. Under this agreement, CHOI-FM was to pay \$75,000 annually to CHRC-AM in return for access to the latter's information service and news bulletins. In practice, however, both parties had difficulties carrying out this service agreement, for both technical and professional reasons. In this regard, Mr. Forand noted, for example, that the journalists in the newsroom felt that this placed them in an absurd conflict of interest. The parties finally amended the agreement to stipulate that the news which CHRC-AM provided to CHOI-FM would henceforth be reported by CHOI-FM's on-air staff. Despite this change and a number of others, CHOI-FM notified CHRC-AM that it was terminating the agreement in late January or early February 1996.

CHRC-AM and CHOI-FM also entered into an agreement on a lump-sum annual basis for technical services. CHRC-AM agreed to provide technical support to CHOI-FM by offering it basic technical services for all its equipment. This agreement is still in effect; however, certain changes had to be made with regard to the fee structure, which is now based on an hourly rate.

Although each station has its own equipment, CHRC-AM also entered into an agreement with CHOI-FM for the use of a vehicle. However, in this instance also the transaction was recorded and the use of the vehicle was invoiced. With regard to certain other services, Mr. Forand noted that certain contracts providing for the provision of common services - such as the photocopier - had continued or continued to be in effect but that this was normal given the fact they were in a transition period. At the present time there is no joint purchasing policy or joint banking service between the two stations. During the transition phase, however, the two stations continued using the joint forms until they were all used up. Each station also has its



own banking system and its own payroll service and each has negotiated separate insurance. Each station deals with a different advertising agency. According to Mr. Forand, it would be inconceivable for the situation to be any different, since these are competing stations.

With regard to the premises occupied by the two stations, Mr. Forand explained that, although they were located in the same building, they occupied different floors. After the conclusion of the September 30, 1994 transaction, an attempt was made to isolate what was CHOI from what was CHRC, with CHOI occupying the first floor, CHRC the third, and the second being shared by the two stations for administration and sales. It was agreed that CHRC's administration and sales team would remain on the second floor and that CHOI's team would temporarily occupy other offices on the second floor during the renovations to the third floor. Naturally, in order to stay on the air during these renovations, certain relocations had to take place. However, Mr. Forand stressed that this took place without any employees being exchanged between the two stations. Today, the two stations each have their own entrance and their own address.

In order to establish the existence of closer ties between the two stations, counsel for the union cross-examined the witness on the case of a former CHRC employee who had worked there as a temporary controller before being laid off in early 1996 and who was subsequently hired by CHOI. Mr. Forand replied that it was common knowledge that the individual in question was looking for work at the time she was hired by CHOI.

Counsel for the union also questioned the witness on the case of a CHOI journalist who had presumably reported a "scoop" on CHRC air during talkshow host André Arthur's program. He filed in evidence the tape of the radio program in question. Counsel asked the witness whether he felt it was normal for a journalist to co-host a program on a competing station. Mr. Forand stated that he could guarantee that this was not a case of co-hosting and that it was entirely normal for a journalist to be

invited from time to time to the station of a competitor interested in dealing with information at the source.

Mr. Demers came back to testify on this point and stated to the Board that he had spoken to the journalist in question and that the latter had indicated that he had first reported the news on CHOI-FM, and that he had accepted Mr. Arthur's invitation only after having obtained authorization from CHOI's programs manager to grant interviews to other media representatives, and that this arrangement was subject to the condition that the news be credited to CHOI. The union did not contradict this version of the facts.

The final witness, Mr. Claude Gilbert, a chartered accountant and partner with Price Waterhouse, testified concerning his role in CHOI's trusteeship as directed by the CRTC to ensure its separateness in relation to CITF-FM, which was owned by Télémédia. Mr. Gilbert had been acting as designated manager at that time, the accounting firm of Price Waterhouse having been appointed manager of CHOI during this period of trusteeship. He filed the management contract in evidence.

#### IV

#### Decision

Relying on the terms and conditions of the master agreement which sets out the framework for the restructuring of AM radio, the union argued that a sale of business had not occurred in the instant case. The union maintained that the applicants had simply reorganized the business and changed the licence holder. According to the union, the fact that Télémédia is ERC's sole shareholder while being one of Radiomédia's two shareholders created such a degree of osmosis that splitting up the bargaining unit as the applicants are seeking to do could be justified. The union argued that the September 30, 1994 contract for the sale of assets between ERC and Radiomédia constituted the official agreement, while the group master agreement

entered into between Radiomutuel and Télémédia on September 15, 1994 was the counter-letter which reflected the parties' true intentions. All the other documents had to be read and interpreted in light of the principles set out in the master agreement. According to the union, this agreement clearly showed that all of ERC's assets were transferred to Radiomédia; consequently, Radiomédia was the employer.

The union also argued that, if the Board were to conclude that a sale of business had occurred in the instant case, it would nonetheless have to dismiss the applications to review the bargaining certificate on the ground that these were in fact applications aimed at splitting up the existing bargaining unit. Instead of combining activities, an attempt was being made to separate them in order to fragment the bargaining unit, which was contrary to the Board's policy.

If the Board concludes that a sale of business did in fact occur in the instant case, the Board has no other choice but to amend the certification order in question so that it reflects these changes. This is simply a question of formalizing a situation. Indeed, in such a case the bargaining rights of the certified bargaining agent are in no way undermined; at most, this means that the bargaining agent must now exercise them with a new counterpart. When part of a business - an economic vehicle - changes hands while retaining the purpose for which it is operated and its essential components, the bargaining rights attached to the business follow the part of the business that has been transferred, while also remaining attached to the part of the business retained. That is precisely what is involved in the instant case. The certification order no longer reflects the reality of the situation because, for the part that was transferred, the name of the new employer-purchaser does not appear and, for the part that was retained, the description of the unit may refer to areas of activity which are no longer operated by the employer-seller.

The relevant parts of section 44 of the Code state as follows:

*"44.(1) In this section and sections 45 to 47.1,*

*"business" means any federal work, undertaking or business and any part thereof;*

*"sell", in relation to a business, includes the lease, transfer and other disposition of the business.*

*(2) Subject to subsections 45(1) to (3), where an employer sells his business,*

*(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;*

*(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;*

*(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and*

*(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent."*

It should be recalled that, in order for a sale of a part of a business to have occurred, the predecessor must have transferred a coherent and severable part of its business from an operational standpoint. The Board considers a variety of factors in determining whether there has in fact been a transfer of a distinct part of the predecessor's business: location, goodwill, equipment, expertise, qualified staff, etc. The type of economic vehicle, the nature of the operations and the sector in question are of considerable significance in this analysis, since factors which may support the finding that a sale of a business has occurred in one sector of the economy may not support the same conclusion in another.



In the instant case, despite the additional documents filed at the hearing by the union, it is the Board's view that the file shows unequivocally that a sale of a part of a business within the meaning of the Code took place on September 30, 1994. ERC sold the CHRC-AM radio station to Radiomédia for \$2 million and there is nothing in the evidence to call this into question. The evidence clearly shows that the subject of the transfer, the CHRC-AM radio station, constitutes a business in itself, that there was continuity in the work and activities carried out by the employees, and that the business sold was operated for the same purpose by the purchaser. As counsel for the applicants argued (and counsel for the union stated that it shared this position), the concept of "sale" must receive a liberal interpretation.

Moreover, as is stated in Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190), the Board's focus in such cases is upon neither the formalities of ownership nor the particular methods whereby the business changes hands. The Board is concerned more with realities than appearances and its enquiry is directed towards establishing the identity of the employer who has acquired, by means encompassed by section 44, the control and use of the business. Each case must be examined on its own merits and must be decided in light of the Board's policy on this matter as set out in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402), in which the Board adopted the criteria set out in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193.


Accordingly, the form of financing chosen for the sale of the station has no impact on the determination as to whether or not a sale took place. What is important from the point of view of the Code is that the conditions set out in section 44 be met. Two financial backers invested in Radiomédia in return for 50 percent of its shares respectively. Although one of them was also the seller's sole shareholder, that does not change the fact that the new corporation that resulted from this investment constitutes a distinct legal entity with its own legal personality.

Furthermore, the fact that the sale of CHRC took place within a context of reorganization must not obscure the fact that it did in fact take place. From this perspective, the union's contention regarding the counter-letter does not withstand analysis. The applicants never denied that the master agreement constituted the framework for the reorganization of the AM radio crystallized by the creation of Radiomédia and that this agreement established the context and outlined the business motivations and true intentions of the parties which must guide the interpretation of the other documents which are to give effect to these intentions.


The Board is also unable to agree with the union's subsidiary argument. Of course, the relationship between Radiomutuel and Télémédia and, more particularly, the control exercised by Télémédia over both ERC and Radiomédia raise, at the outset, a number of questions as to their impact in terms of the control exercised by the respective players from a labour relations standpoint. In the instant case, however, the union has not shown that the businesses in question were operated jointly or that there was common control or management, unlike the situation in Radio Acadie Ltée, CJVA-AM, and Radio de la Baie Ltée, CKLE-FM (1994), 94 di 128 (CLRB no. 1071), in which the Board deemed it appropriate to issue a declaration of common employer. Furthermore, the union did not prove that the reorganization which constituted the background for the transaction in issue would in any way serve to erode the bargaining rights. In reality, there is nothing in the instant case which would lead to the conclusion that the employers were attempting to escape from their obligations under the Code by restructuring their businesses or by making other types of business decisions.

Lastly, it should be noted that the splitting up of the bargaining unit which resulted from the sale of a part of the business did not in itself have the effect of determining which employees at each of the employers could have rights under the collective agreement which now binds the seller and the purchaser. These rights under the said collective agreement must, if necessary, be determined by an arbitrator and not by the Board.

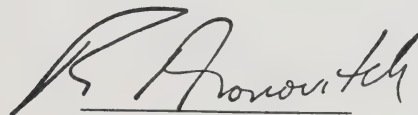
For the foregoing reasons, the Board allows the applicants' request for review and orders that the certification order dated May 17, 1982 and amended on March 25, 1986 be amended to reflect the situation as it now exists at CHOI-FM and CHRC-AM since the sale of the latter on September 30, 1994.



J. Philippe Morneau  
Vice-Chair



Véronique L. Marleau  
Member



Roza Aronovitch  
Member





Canada  
Labour  
Relations  
Board  
Conseil  
Canadien des  
Relations du  
Travail

Board Files: /530-2560  
585-620

Amending: 530-1326  
555-1735

IN THE MATTER OF THE

Canada Labour Code

- and -

Radiomédia Inc.,  
Montréal, Quebec,

applicant  
employer,

- and -

Syndicat des employés de CHRC et CHOI-FM,  
Local 2645 of the Canadian Union of  
Public Employees,

certified  
bargaining agent.

**WHEREAS** the Canada Labour Relations Board, by Order dated May 17, 1982 (555-1735), certified the Syndicat des employés de CHRC et CHOI-FM, Local 2645 of the Canadian Union of Public Employees, as the bargaining agent for a unit of employees of Les Entreprises Télé-Capitale Ltée, "Division CHRC-CHOI-FM";

**AND WHEREAS** the Canada Labour Relations Board, by Order dated March 25, 1986 (530-1326) amended the above Order so as to change the name of the employer to "Capital Radio Broadcasting Operations Inc., 'CHRC-CHOI-FM Division' ", the bargaining unit remaining the same;

**AND WHEREAS** the Canada Labour Relations Board ascertained that Capital Radio Broadcasting Operations Inc., "CHRC-CHOI-FM Division" has disposed of part of its business, namely the CHRC-AM station, by selling it to Radiomédia Inc., this constituting a partial sale of business within the meaning of section 44 of the Code;

**AND WHEREAS**, the Canada Labour Relations Board has received an application from the applicant employer for review, pursuant to section 18 of the Canada Labour Code (Part I -Industrial Relations), seeking to amend the said Order dated May 17, 1982 as amended by Order dated March 25, 1986, in order for the

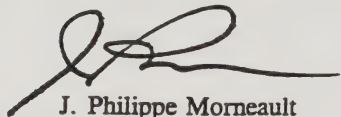
Board to issue two distinct Certification Orders for each of the two stations, namely one to represent the employees of Radiomédia Inc., CHRC-AM station, and the other to represent the employees of Capital Radio Broadcasting Operations Inc., CHOI-AM station;

AND WHEREAS, following investigation of the application and consideration of the submissions of the parties concerned, the Board has determined that it is appropriate to grant the application.

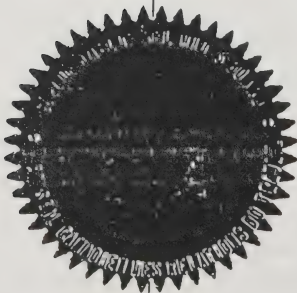
NOW, THEREFORE, it is ordered by the Canada Labour Relations Board that the said Order of Certification be further amended, and it is hereby amended, by deleting the description of the certified bargaining unit contained therein and by substituting therefor the following:

*"all employees of Radiomédia Inc., CHRC-AM station, excluding general manager and his secretary, public relations manager, programs manager, director of information, sports director, technical director, director of personnel, credit and auditing, sales manager, sales representatives and freelancers".*

ISSUED at Ottawa, this 7th day of February 1997, by the Canada Labour Relations Board.



J. Philippe Morneault  
Vice-Chairman



## IN THE MATTER OF THE

*revoked by: 565-51*

Canada Labour Code

- and -

Capital Radio Broadcasting Operations Inc.,  
Ste-Foy, Quebec,applicant  
employer,

- and -

Syndicat des employés de CHRC-CHOI-FM,  
Local 2645 of the Canadian Union of  
Public Employees,certified  
bargaining agent.

**WHEREAS** the Canada Labour Relations Board, by Order dated May 17, 1982 (555-1735), certified the Syndicat des employés de CHRC et CHOI-FM, Local 2645 of the Canadian Union of Public Employees, as the bargaining agent for a unit of employees of Les Entreprises Télé-Capitale Ltée, "Division CHRC-CHOI-FM";

**AND WHEREAS** the Canada Labour Relations Board, by Order dated March 25, 1986 (530-1326) amended the above Order so as to change the name of the employer to "Capital Radio Broadcasting Operations Inc. 'CHRC-CHOI-FM Division'", the bargaining unit remaining the same;

**AND WHEREAS** the Canada Labour Relations Board ascertained that Capital Radio Broadcasting Operations Inc., "CHRC-CHOI-FM Division" has disposed of part of its business, namely the CHRC-AM station, by selling it to Radiomédia Inc., this constituting a partial sale of business within the meaning of section 44 of the Code;

**AND WHEREAS** the Canada Labour Relations Board has also recognized that Capital Radio Broadcasting Operations Inc. still owns CHOI-FM and continues the business of that station;

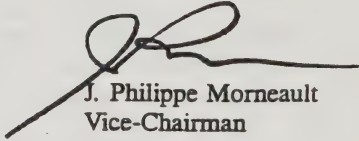
AND WHEREAS, the Canada Labour Relations Board has received application from the applicant for review, pursuant to section 18 of the Canada Labour Code (Part I -Industrial Relations), seeking to amend the said Order dated May 1982 as amended by Order dated March 25, 1986, in order for the Board to issue distinct Certification Orders for each of the two stations, namely one to represent employees of Radiomédia Inc., CHRC-AM station, and the other to represent employees of Capital Radio Broadcasting Inc., CHOI-FM station;

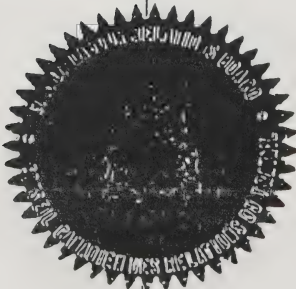
AND WHEREAS, following investigation of the application and consideration of the submissions of the parties concerned, the Board has determined that it is appropriate to grant the application.

NOW, THEREFORE, it is ordered by the Canada Labour Relations Board that the said Order of Certification be further amended, and it is hereby amended, by deleting the description of the certified bargaining unit contained therein and by substituting therefor the following:

*"all employees of Capital Radio Broadcasting Operations Inc., CHOI-FM station, excluding general manager and his secretary, public relations manager, programs manager, director of information, sports director, technical director, director of personnel, credit and auditing, artistic director, production director, sales manager, sales representatives and freelancers".*

ISSUED at Ottawa, this 7th day of February 1997, by the Canada Labour Relations Board.

  
J. Philippe Morneault  
Vice-Chairman





# information

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## Summary

Air Nova Inc., *complainant*, and Canadian Airline Pilots Association, *respondent*.

Board File: 745-5598  
CLRB/CCRT Decision no. 1196  
February 14, 1997

Complaint pursuant to section 97(1) of the Canada Labour Code (Part I - Industrial Relations) alleging a violation of section 50 by the Canadian Airline Pilots Association (CALPA).

Air Nova alleges that CALPA has breached the duty to bargain in good faith provisions by: "negotiating to an impasse a question relating to the 'scope of the bargaining unit'; refusing to put forward a complete set of proposals for negotiation specifically with concern to salary levels and working conditions; and refusing to negotiate changes to the proposals put forward by CALPA".

The Board dismisses the complaint. The evidence reveals that since the collective agreement between the parties has expired in May 1995, they have been anxious to make a collective agreement. The vital issue of contention, however, is the seniority protection of Air Nova pilots. Although this is a natural and normal collective bargaining concern, it is difficult to achieve in the particular circumstances of this case. The Board examines the labour relations situation in existence between the parties, Air Canada and ACPA, and concludes that CALPA's

## Résumé

Air Nova Inc., *plaignante*, et Association canadienne des pilotes de lignes aériennes, *intimée*.

Dossier du Conseil: 745-5598  
CLRB/CCRT Décision n° 1196  
le 14 février 1997

Plainte déposée en vertu du paragraphe 97(1) du Code canadien du travail (Partie I - Relations du travail) alléguant violation de l'article 50 par l'Association canadienne des pilotes de lignes aériennes (CALPA).

Air Nova allègue que CALPA a manqué à son devoir de négocier de bonne foi en négociant jusqu'à l'impasse une question concernant la «portée de l'unité de négociation», en refusant de soumettre une série complète de propositions aux fins de négociation portant tout particulièrement sur les taux de salaire et les conditions de travail ainsi qu'en refusant de négocier les changements apportés aux propositions de CALPA.

Le Conseil rejette la plainte. La preuve révèle que, depuis l'expiration en mai 1995 de la convention collective, les parties étaient désireuses de conclure une convention collective. La question cruciale en l'espèce, cependant, est la protection de l'ancienneté des pilotes d'Air Nova. Bien qu'il s'agisse d'un objectif naturel et normal de négociation collective, il est difficile à atteindre dans les circonstances de la présente affaire. Le Conseil a examiné les relations de travail qui régnaient entre les parties, Air Canada et APAC, et conclut que les efforts déployés par

efforts to achieve that goal have been understandable, open and eminently fair. It cannot be said, therefore, that CALPA has failed to bargain in good faith.

The Board reminds the parties that notwithstanding the strike in progress, there remains a serious obligation under the Code for Air Nova and CALPA to continue to bargain and make every effort to conclude a collective agreement.

la CALPA pour atteindre cet objectif sont compréhensibles, ouverts et des plus équitables. On ne peut donc pas dire que CALPA n'a pas négocié de bonne foi.

Le Conseil rappelle aux parties que, pendant la grève en cours, Air Nova et CALPA ont le devoir en vertu du Code de continuer à négocier et à faire tout effort pour conclure une convention collective.

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## Reasons for decision

Air Nova Inc.,

*complainant,*

*and*

Canadian Air Line Pilots Association

*respondent.*

Board File: 745-5598

CLRB/CCRT Decision no. 1196

February 14, 1997

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, Mr. Michael Eayrs, and Ms. Véronique Marleau, Members. A hearing was held on February 10, 11, 12, 13 and 14, 1997, at Halifax, N.S.

### Appearances

Mr. Brian Johnston, accompanied by Messrs. Frank Angeletti, David McCarthy and Winston Clarke, for the complainant; and

Mr. John Keenan, accompanied by Messrs. Roman Stoykewych and Ron Young and Ms. Sarah Atkinson, for the respondent.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

### I

This is a complaint filed January 17, 1997, pursuant to section 97(1) of the Canada Labour Code, alleging a violation of section 50 of the Code. Ministerial Consent was granted on February 3, 1997. In particular, the allegation is that the respondent Canadian Airline Pilots Association (CALPA, now known as Air Line Pilots Association ALPA) has breached section 50 of the Canada Labour Code by:

- "(a) negotiating to an impasse the issue of broadening the scope of its certified bargaining unit;*
- (b) refusing to put forward a complete set of proposals for negotiation, specifically with concern to salary levels and working conditions;*
- (c) refusing to negotiate changes to the proposals put forward by CALPA."*

(Complaint, paragraph no. 10)

It is also alleged that the respondent has bargained to impasse over a matter which is before this Board for determination in a separate application. That matter is the application by the respondent (CALPA) for a declaration of single employer pursuant to section 35 of the Canada Labour Code.

Certainly, if the respondent did force negotiations to impasse, and consequently called a strike over a question relating to the "scope of the bargaining unit" as that expression is properly understood, then it could be said (and the jurisprudence which has issued from this and other labour relations boards would support such a conclusion), that there was a failure to bargain in good faith.

This application is, we find, a timely one under the provisions of the Code and the Regulations.

## II

These allegations cannot be understood without some description of the background.

Air Nova Inc. is a regional "connector" airline entirely owned by Air Canada. It is a separate corporate entity and the aircraft it operates are, to a large degree, distinct from those operated by Air Canada on its own behalf. It employs some two hundred pilots whereas Air Canada now employs nearly two thousand. Its aircraft are, generally, smaller than those of Air Canada and are for the most part turboprop aircraft although



it operates a few BAe 146 jet aircraft. An initiative by Air Nova to operate the fifty passenger Canadair Regional Jet was pre-empted by Air Canada which took over Air Nova's order for such aircraft and purchased them for operation by its own pilots.

In 1994, with a view to protecting the employment of its members, CALPA then bargaining agent for pilots employed by Air Canada, Air Nova and the other "regional" airlines owned by Air Canada declared, as its constitution contemplated it might do, that Air Canada and its regional airlines constituted a single employer. The union then sought to create a merged seniority list. This action was an internal union initiative without binding effect on the various employers of the pilots concerned. Since it would be open to Air Canada as the unique shareholder of all of the airlines to control the line, the aircraft, the schedule and thus the employees involved in the operation of any equipment, it is apparent that seniority within the individual companies was not a reliable form of employment protection, at least for pilots involved in the flying of the connector aircraft. For those pilots, a merged seniority list would provide much stronger safeguards and a more equitable system. Large jet aircraft are flown only by Air Canada itself and the pilots of that equipment are in positions as secure as the nature of the industry allows.

The Air Canada pilots, represented at the time by CALPA, did not agree with the concept of merged seniority. The matter was the subject of an arbitration within the union, the parties being CALPA itself and the various "Master Executive Councils" of CALPA in respect of the several members of the Air Canada group. In March 1995, arbitrator Michel Picher issued an award in the matter setting out a formula which in effect provided for "dovetailed" seniority (at the lower end of the Air Canada pilots seniority list), as between the pilots of the various airlines flying smaller equipment, while protecting the rights of Air Canada pilots flying larger jets. Very roughly, about eighty-five percent of the Air Canada pilots were unaffected by this while about fifteen percent (some 250 pilots) found themselves subject to dovetailed seniority with the regional pilots. The rationale for this is in part set out at pages 67 and 71 of the Picher award:

*"Insofar as the further objective of the CALPA Merger Policy regarding minimizing the impact on career potential is concerned, a significant aspect of the Connectors' proposal is that, for the purposes of future bidding, it will only affect 249 Air Canada pilots, junior on the list to O'Hara, some 243 of whom are presently on furlough. Again, for the critical purposes of bidding domicile, seat and equipment, 1,433 Air Canada pilots will be entirely unaffected, forever. Only 15% of the pilots on the existing Air Canada seniority list, virtually all of whom are presently laid off will be impacted in the future by the date of hire seniority list and bidding formula proposed by the Connector MECs. Moreover, those pilots will be fully protected by the no-flush/no-bump provision upon their return from furlough.*

...

*Air Canada acts, quite properly, in its own best interests, and its continued success is much to be desired. However, the abiding reality which every pilot must understand when thinking about this merger is that there is but one Company, there is but one employer. A failure of Air Canada pilots to understand and appreciate that reality will result in everyone paying a great price. The lessons of the furloughs and of the regional jet rates should not be forgotten. A single seniority list, supported by all pilots, is the best, perhaps the only, long-term protection against the pattern of divide and conquer that has marked the past."*

Following the Picher award, pilots in the Air Canada bargaining unit made an application to this Board and, following a vote, became represented by the Air Canada Pilots Association (ACPA) in November 1995, and were no longer represented by CALPA.

Subsequently ACPA and Air Canada negotiated a collective agreement, presently in effect. This agreement includes provisions relating to the scope of operations of the connector carriers - not parties to that collective agreement - and restricting the work of their pilots.

It is clear, as the respondent contends, that these provisions are designed to carve out for the Air Canada pilots, exclusively, the most important and remunerative flying done by the entire Air Canada family including the connectors.

The collective agreement between Air Nova and CALPA expired May 31, 1995. CALPA gave notice to bargain on March 15, 1995. Air Nova responded, but little was done to proceed to negotiations until 1996.

In May 1996, CALPA made an application to this Board for a declaration that Air Canada and its regional carriers constituted a single employer pursuant to section 35 of the Code. Those proceedings, which are very complex and involve many parties - many employers and many trade unions - are continuing.

### III

It is against this background that CALPA seeks a renewed collective agreement with the applicant Air Nova. It has stated that the terms and conditions of employment - benefits, pensions, hours and most of the other provisions of the collective agreement - are satisfactory and it has advanced no specific demands in respect of such matters. Its prime concern is with respect to the seniority and work opportunity question and the employer acknowledges that this is a serious and legitimate concern. Accordingly, the only demands put forward by CALPA in bargaining were related to the scope of the work to be performed by members of the bargaining unit and to wages. It is this "scope" demand which the employer asserts to be one which, while not improper to be raised, is one which may not properly be taken to impasse. It is not a demand, it is said, which is within the power of Air Nova to grant. CALPA's proposal concerning scope of work was withdrawn in October 1996 when negotiations concerning the single employer question were initiated.

There are two principal observations to be made with respect to the applicant's position. First, CALPA's demand is not one which goes to the *scope* of the *bargaining unit*. CALPA does not seek to expand the bargaining unit or to alter its description. Although referred to as a "scope" demand, what is sought is more in the nature of a contracting-out clause, something quite properly found in many collective agreements. We would note as well that in other industries, collective agreement provisions may be found which

contemplate the exercise of seniority in units other than the one to which the collective agreement applies. Second, the matter is not one which it is beyond Air Nova's power to deal with in a substantive way, although clearly Air Nova could not make legally binding commitments in respect of Air Canada. Air Nova could, subject to its own determinations of what it was willing to do, or what it found it economically feasible to do, offer various forms of job security to its pilots based on their seniority not only with Air Nova but within the Air Canada system, subject to whatever criteria might be bargained. As well, it is clear that Air Nova's response, that it could not commit Air Canada, begs the question, yet to be determined in the other proceedings before this Board, of the control exercised or exercisable by Air Canada over Air Nova or, for that matter, over the other connectors. In this regard we cannot ignore the reality of the relationship between the main carrier and its connectors in considering the parties' positions at the bargaining table and their respective concerns and priorities.

In fact, the two parties did bargain over the matter. Air Nova, together with the other connectors, retained very experienced labour relations counsel to act for them, and to act as a "conduit" to Air Canada. The applicant's evidence makes it very clear that Air Canada was involved in the negotiations and that it understood the need of its subsidiaries' pilots for seniority protection relative to its own pilot employees, now represented by ACPA. The evidence is that Air Canada sought to involve ACPA in the negotiations, as it would seem wise to do if Air Canada, whether directly or through its subsidiaries, were to avoid onerous obligations which might arise from potentially conflicting seniority provisions. This is consistent with the view expressed by Adams J. in Canadian Labour Law (2nd edition page 10-106):

*"If negotiations are to be meaningful, then the bargaining must occur in the presence of employer representatives who are sufficiently proximate to the ultimate decision maker to ensure that employee concerns are not being aired on deaf ears."*

ACPA, whose ranks have been swelled by an influx of pilots recently hired by Air Canada for the operation of smaller aircraft, and apparently anxious to defend its own



members regardless of the effects on their more senior former colleagues, resisted any participation, although it eventually made an "offer" to CALPA. This offer contemplated the hiring of regional pilots for the Canadair jet flown by Air Canada although such pilots would come at the bottom of the seniority list. Without going into the details of that offer it is sufficient to say that we agree with the view expressed by counsel for CALPA that it was unreasonable and offensive. It appears to us to have been in the nature of a last-minute, deal-breaking manoeuvre.

That offer was presented at a point when the negotiations between the applicant and CALPA were, on the evidence, on the verge of success. In fact, an offer had been made to CALPA on behalf of Air Nova and the other connectors which CALPA was prepared to agree to. The connectors, aware that some sort of offer was to be made by ACPA, indicated that they were not then ready to sign the offer that they themselves had made. Air Canada then announced that it supported the ACPA position. Thus, the shareholder, Air Canada, made it clear to the employees of its wholly-owned subsidiary that it was not concerned with their job security. If Air Canada took this stand in favor of one pilot group over the other, how could it have expected to reach a compromise over the integration issue?

There is a separate application before this Board brought by CALPA against Air Nova on February 6, 1997, alleging failure to bargain in good faith. There has as yet been no ministerial consent granted in respect of that application, and no reply filed. That matter is not before us and accordingly we make no determination as to whether or not Air Nova has bargained in good faith.

From all of the evidence before us, it is clear that both of the immediate parties to the present application - Air Nova and CALPA - have been anxious to make a collective agreement. What separates them is the particular and vital matter of seniority protection of Air Nova pilots. There is no doubt that the management of Air Nova understands and is sympathetic to the pilots' position. Seniority protection is a natural and normal collective bargaining concern although it is particularly difficult to achieve in

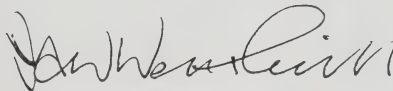
circumstances such as those in the present case. CALPA's efforts to achieve that goal have been understandable, open and eminently fair. It simply cannot be said that in the circumstances of this case there has been a failure to bargain in good faith on the part of CALPA.

We must stress, however, as this Board has done in other cases, that the duty to bargain does not cease when a work stoppage commences. Pilots at Air Nova have been on strike since January 10, 1997, over a matter which many would consider to be one of elementary justice in the workplace. Air Nova and CALPA have practiced and enjoyed good labour relations, free from strike, until the current round of bargaining. The current strike must inevitably involve loss of work by other Air Nova employees. Given the circumstances of the instant case we feel bound to remind the parties that notwithstanding the strike in progress there remains a serious obligation under the Code for Air Nova and CALPA to continue to bargain and make every effort to conclude a collective agreement.

The owner of Air Nova, Air Canada, has, as the evidence before us establishes, refused to allow its subsidiary to make an effective agreement which would provide its pilots with reasonable job protection, although it has itself entered into an agreement with ACPA which makes a mockery of the seniority principle as well as of the notion of union solidarity. This, even though such agreement provides windfall benefits for only a small proportion - the very junior pilots - of the Air Canada bargaining unit. The responsibility of Air Canada for connector operations has been recognized in other proceedings: before this Board in Air Canada et al. (1989), 79 di 98 (CLRB no. 771); before the Commission of Inquiry into the Dryden crash; and before arbitrator Picher; it also appears clearly from the evidence before us in the present case. In our view, the evidence establishes that the current strike has, effectively, been provoked by Air Canada and by ACPA.

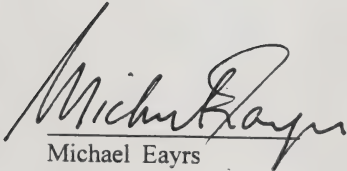
It is not open to this Board, in this case, to make an order which will resolve the matter or settle the strike. We urge the parties, however, to return to the bargaining table and to work.

For all of the above reasons, the present complaint must be dismissed.



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J.F.W. Weatherill  
Chairman



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Michael Eayrs  
Member



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Véronique L. Marleau  
Member





# Information

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## Summary

Canadian Airline Pilots Association, *applicant*, and Intair Inc. & Intair Corporation, and Inter-Canadian (1991) Inc., *employers*, and Teamsters Brewery, Soft Drinks and Miscellaneous Workers' Union, Local 1999 and International Association of Machinists and Aerospace Workers, *interested parties*.

Board Files:	530-1395	530-1403
	560-137	560-142
	585-163	585-168
	530-1629	530-1956
	560-194	585-426
	585-238	

CCRT/CLRB Decision no. 1197  
February 25, 1997

This decision constitutes a definitive ruling with respect to applications filed in 1986, 1988 and 1991 by the Canadian Airline Pilots Association (CALPA) in connection with the dismantling and privatization of the air carrier Québecair, seeking declarations of single employer and declarations that sales of businesses have occurred.

The time that has elapsed with respect to these matters led the Board to reflect on the most appropriate course of action in order to rule on these applications.

After considering the representations made by the parties in this matter, the Board decided:

1. not to hear and rule on the merits of the 1986 and 1988 applications.

*Ce document n'est pas officiel. Seuls les **Motifs de décision** peuvent être utilisés à des fins juridiques.*

## Résumé

Association canadienne des pilotes de lignes aériennes, *requérante*, et Intair Inc. & Corporation Intair, et Inter-Canadien (1991) Inc., *employeurs*, et Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, section locale 1999, et Association internationale des machinistes et des travailleurs de l'aérospatiale, *parties intéressées*.

Dossiers du Conseil:	530-1395	530-1403
	560-137	560-142
	585-163	585-168
	530-1629	530-1956
	560-194	585-426
	585-238	

CCRT/CRLB Décision n° 1197  
le 25 février 1997

Cette décision tranche de façon définitive plusieurs demandes de déclaration d'employeur unique et de vente d'entreprise présentées en 1986, 1988 et 1991 par l'Association canadienne des pilotes de lignes aériennes (CALPA) dans le cadre du démantèlement et de la privatisation de la compagnie aérienne Québecair.

Les longs délais écoulés ont amené le Conseil à s'interroger sur l'approche à privilégier pour statuer sur ces demandes.

Après avoir pris en considération les observations des parties sur cette question, le Conseil a décidé:

1. de ne pas entendre et de ne pas décider au fond les demandes de 1986 et de 1988.

With respect to applications seeking a declaration of single employer, the Board ruled that such declarations would not serve the purposes of labour relations within the meaning of the Code. The Board reassessed that the exercise of its discretionary power pursuant to section 35 was not a theoretical consideration. In this case, the Board considered that a declaration of single employer, in respect of conditions which existed in 1986 and 1988, to determine certain rights which CALPA claims have been infringed over the years, would result in a significant change in labour relations with the current employer.

As far as the applications seeking declarations that sales of businesses have occurred, the Board ruled that such declarations would be subordinate, in the matters at hand, to the application of section 45. This provision does not allow the Board to resolve all the difficulties which result from a sale of a business, but only to determine the rights of parties with respect to bargaining units and union representation. In this respect, the Board concluded that the time elapsed and the consequences of the sales of businesses in 1986 and 1988 for all the interested parties preclude a definitive ruling on these matters. The Board decided not to rule on these applications, given their theoretical nature, as defined by the Supreme Court of Canada in Borowski v. Canada (Sollicitor General), [1989] 1 S.C.R. 342.

2. to rule on the application seeking a declaration of sale of business filed in 1991.

The Board ruled that the sale of Intair Inc.'s regular flight operations to Inter-Canadian (1991) Inc. on March 4, 1991, constituted a partial sale of business within the meaning of the Code.

En ce qui concerne les demandes de déclaration d'employeur unique, le Conseil a décidé que de telles déclarations ne serviraient pas les fins de relations de travail prévues au Code. Le Conseil a réaffirmé que l'exercice de sa discrétion aux termes de l'article 35 ne s'effectue pas dans l'abstrait. En l'espèce, il a considéré qu'une déclaration d'employeur unique, qui viserait des situations ayant existé en 1986 et 1988, afin de déterminer certains droits dont CALPA estime avoir été lésée au fil des ans, entraînerait une modification radicale des relations de travail chez l'employeur actuel.

En ce qui concerne les demandes de déclaration de vente d'entreprise, le Conseil a considéré que de telles déclarations seraient subordonnées, dans les présents dossiers, à l'application de l'article 45. Cette disposition ne permet pas au Conseil de résoudre toutes les difficultés qui découlent d'une vente d'entreprise mais seulement de trancher les droits des parties en matière d'unité de négociation et de représentation syndicale. À cet égard, le Conseil a conclu que l'écoulement du temps et les conséquences des ventes d'entreprises qui seraient intervenues en 1986 et en 1988 sur tous les intéressés l'empêchent de décider de façon concrète et efficace ces questions. Le Conseil a décidé de ne pas statuer sur ces demandes vu leur caractère théorique au sens où la Cour suprême du Canada l'a défini dans Borowski c. Canada (Procureur général), [1989] 1 R.C.S. 342.

2. de statuer sur la demande de déclaration de vente d'entreprise présentée en 1991.

Le Conseil a déterminé qu'une vente partielle d'entreprise au sens du Code est intervenue le 4 mars 1991 lorsque Intair Inc. a vendu à Inter-Canadien (1991) Inc. l'exploitation de son service de vols réguliers.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

The Board associated itself with the conclusion of another Board panel in the matter of Intair Inc. et al. (1993), 93 di 83 (CLRB no. 1042) before which the same facts, the same parties, the same questions and the same arguments had been reviewed. This review had then led the Board to declare that the sale of the Intair's regular flight operations to Inter-Canadian (1991) Inc. was a partial sale of business within the meaning of the Code.

The Board determined that Intair Inc.'s pilots hired by Inter-Canadian (1991) Inc. and the pilots already working for this employer were intermingled as defined in section 45(1) of the Code, following the closing of the sale.

The Board determined that all the pilots working for Inter-Canadian (1991) Inc. constitute a unit appropriate for collective bargaining. At the time of the sale of the business, the Teamsters represented the majority of the pilots and have represented all of Inter-Canadian (1991) Inc.'s pilots since then, including those who came from Intair Inc. The Board determined that the Teamsters must be certified as the bargaining agent for Inter-Canadian (1991) Inc.'s pilots.

The Board dismissed CALPA's application seeking authorization to file grievances retroactively against Inter-Canadian (1991) Inc. as well as the application seeking a Board order requiring Inter-Canadian (1991) Inc. to compensate CALPA for the loss of income of its members following the lay-off of Intair Inc.'s pilots subsequent to the sale of business in March 1991.

Le Conseil a fait sienne la conclusion d'un autre banc du Conseil dans Intair Inc. et autres (1993), 93 di 83 (CCRT n° 1042) où les mêmes faits, les mêmes parties, les mêmes questions et les mêmes arguments avaient été examinés et avaient alors conduit le Conseil à déclarer que la vente du service de vols réguliers d'Intair Inc. à Inter-Canadien (1991) Inc. était une vente partielle d'entreprise au sens du Code.

Le Conseil a déterminé que les pilotes d'Intair Inc. embauchés par Inter-Canadien (1991) Inc. et les pilotes travaillant déjà pour cet employeur ne formaient plus qu'un seul personnel au sens du paragraphe 45(1) du Code une fois la vente conclue.

Le Conseil a décidé que tous les pilotes qui travaillent pour Inter-Canadien (1991) Inc. constituent une unité habile à négocier. Au moment de la vente d'entreprise, les Teamsters représentaient la majorité des pilotes et, depuis ce moment, ils ont représenté l'ensemble des pilotes d'Inter-Canadien (1991) Inc., y compris ceux en provenance d'Intair Inc. Le Conseil a décidé que les Teamsters doivent être accrédités à titre d'agent négociateur de l'unité de négociation des pilotes chez Inter-Canadien (1991) Inc.

Le Conseil a rejeté la demande de CALPA en vue d'être autorisée à présenter des griefs de façon rétroactive à Inter-Canadien (1991) Inc. de même que celle visant à obtenir du Conseil une ordonnance pour que Inter-Canadien (1991) Inc. indemnise CALPA pour les pertes de revenus de ses membres à la suite de la mise à pied de pilotes d'Intair Inc. après la vente d'entreprise de mars 1991.





## Reasons for decision

Canadian Air Line Pilots Association,

*applicant,*

*and*

Intair Inc. & Corporation Intair, and Inter-  
Canadian (1991) Inc.,

*employers,*

*and*

Teamsters Brewery, Soft Drinks and  
Miscellaneous Workers' Union, Local 1999,  
and International Association of Machinists and  
Aerospace Workers,

*interested parties.*

Board Files: 530-1395  
560-137  
585-163

530-1403  
560-142  
585-168

530-1629  
560-194  
585-238

530-1956  
585-426

CCRT/CLRB Decision no. 1197  
February 25, 1997

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The Board was comprised of Ms. Louise Doyon, Vice-Chair, Mr. François Bastien and Ms. Roza Aronovitch, Members. Hearings were held in Montréal on April 15, 1994, April 11 and 12, 1996, and December 5, 1996.

### Appearances

Mr. John T. Keenan and Ms. Lila Stermer, for the applicant;

Mr. Guy Dufort, assisted by Mr. Martin Tangué, for the employers;

Mr. Stéphane Lacoste, assisted by Messrs. Gaétan Morin and Gaétan Guimond, for Teamsters Local 1999, interested party; and

Mr. James L. Shields, for the International Association of Machinists and Aerospace Workers, interested party.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

### Introduction

This decision deals with three applications for a declaration of single employer and four applications for a declaration of sale of business filed in 1986, 1988 and 1991 by the Canadian Air Line Pilots Association (CALPA) in connection with the dismantling and privatization of the air carrier Québecair.

The applications for judicial review filed with the Federal Court of Appeal by the employers involved in the 1986 applications, subsequent to the Board ordering them to file documents resulted in lengthy delays. Those judicial review proceedings were conducted from 1987 to 1993 and the Board accordingly put all of the CALPA applications in abeyance. The Supreme Court of Canada did not rule on those applications until October 21, 1993 (see Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association, [1993] 3 S.C.R. 724).

The applications covered several employers and unions, at one time or another, between 1986 and 1991. Besides CALPA, which was certified on March 23, 1965 to represent the pilots working for Nordair Ltd. and on July 13, 1981 to represent the pilots working for Québecair, the other unions involved are:

. the Teamsters Brewery, Soft Drinks, and Miscellaneous Workers' Union, Local 1999 (the Teamsters), certified to represent the pilots working for Propair Inc. (April 26, 1982), Québec Aviation Ltée (July 17, 1987) and Nordair Métro (July 17, 1987); and

. the International Association of Machinists and Aerospace Workers (IAM) certified to represent ground employees (February 17, 1986), office employees (February 17, 1986) and supervisors (January 11, 1988) working for Québecair.

It would be pointless at this time to give a complete list of the employers affected by CALPA's applications, as most of them have ceased to exist or to be employers within the meaning of the Code. This situation is moreover a key factor in the present cases to which we will return.

Following the Supreme Court of Canada judgment, the Board held a pre-hearing meeting on April 15, 1994 to review all CALPA applications. This meeting gave rise to an exchange of documents and comments between the parties which were then taken under consideration by a new Board panel in the late fall of 1995.

That panel, consisting of Ms. Louise Doyon, Vice-Chair, Mr. François Bastien and Ms. Roza Aronovitch, Members, held hearings in all these files on April 11 and 12, 1996 and December 5, 1996.

CALPA, Inter-Canadian (1991) Inc. (Inter 1991), the Teamsters and the IAM were represented by counsel at the hearings on April 11 and 12, 1996; the IAM was absent on December 5, 1996. Intair Inc. (Intair) and Corporation Intair received a hearing notice, but informed the Board that they would not attend. The other employers covered by the two applications filed in 1986 (Board files 530-1395, 560-137, 585-163, 530-1403, 560-142, 585-168) and by the 1988 application (Board files 530-1629, 560-194 and 585-238) were also not present at these hearings, because they had, as

stated above, ceased to exist or to be employers within the meaning Code. In fact, only the Teamsters were represented for the purposes of the 1986 and 1988 applications.

At the hearings, the Board heard the parties' arguments on a number of issues that had been identified in advance, in particular, the applicability of the doctrine of mootness as elaborated by the Supreme Court of Canada.

The present decision disposes of all of the single employer and sale of business applications as well as CALPA's ancillary requests submitted at the pre-hearing meeting of April 15, 1994 for authorization to file grievances retroactively against Inter 1991 and for compensation for financial losses incurred by its members following their lay-off as a result of the sale of business in 1991.

## I

### Status of files

#### 1. The Applications

On March 16, 1996, Mr. Yves Proulx, senior labour relations officer, submitted to the Board and to the parties a report prepared at the Board's request on the background of all proceedings since 1986 and their current status, having regard to the parties' admissions and the Board's decisions in those and related files, in particular the IAM's files, decided in Intair Inc. et al. (1993), 93 di 83 (CLRB no. 1042) (Board files 530-1955, 585-425 and 560-259). We will deal later with the impact of these files in this case.

Mr. Proulx's report gives a succinct yet complete description of the various proceedings involved.



Without providing a detailed account of that report, we wish to highlight the following.

- A. CALPA's first two applications, filed respectively on August 12 and September 11, 1986 pursuant to sections 18, 35 and 44 of the Code, dealt with the changes that occurred in Québecair's legal and operational structure following the dismantling and privatization of that company. In its first application, CALPA asked the Board to declare that Québecair and other employers, including Propair Inc. and Québec Aviation Ltée, constituted a single employer within the meaning of the Code or, alternatively, declare that sales of businesses had occurred between those various employers and that CALPA's certification to represent Québecair pilots as well as the collective agreement entered into with that company applied to all pilots affected by the changes.

At that time, Propair Inc. pilots were represented by the Teamsters pursuant to a certification order dated April 26, 1982. On August 8 and November 13, 1986, the Teamsters filed applications for certification to represent Québec Aviation Ltée and Nordair-Métro pilots. The Board granted both applications on July 17, 1987.

- B. CALPA's third application, which was filed on June 16, 1988, dealt with other changes to the legal and operational structure at Québecair and/or successor employers in 1986, which allegedly gave rise to single employer declarations or, alternatively, sale of business declarations. CALPA accordingly asked to be recognized as the certified bargaining agent of a bargaining unit consisting of all pilots working for the employers covered by the application, including those represented by the Teamsters, and asked that the collective agreement entered into with Québecair apply to the pilots of that bargaining unit.

C. On May 6, 1991, CALPA filed a sale of business application, alleging that the changes that had occurred since 1988 in respect to the employers and their successors constituted a sale of business, within the meaning of the Code, between Intair Inc. (Intair) and Les Lignes aériennes Inter-Québec Inc. (Inter-Québec), which later became Inter-Canadian (1991) Inc. (Inter 1991).

CALPA claimed that this sale of business involved Intair's regular flight service which was apparently purchased by Inter 1991. It asked that the Board declare that it was the bargaining agent for the pilots assigned to those operations and that the new employer, Inter 1991, was bound by the collective agreement entered into with Intair. It also asked that the Board find that all pilots working for the new employer, including those still represented by the Teamsters at Inter-Québec, were intermingled within the meaning of section 45 and that, pursuant to section 45(4) of the Code they all had access, in accordance with their seniority, to the work arising from the operations affected by the sale of business.

This application did not include a single employer application, since Inter-Québec, or Inter 1991, was the only successor employer.

In addition to the applications under sections 35, 44 and 45 of the Code, CALPA filed several grievances with Nordair Ltd., Québecair and Intair between 1986 and 1991, in which it alleged that the collective agreements had been violated as a result of the legal and operational changes on which it based its claims under sections 44 and 45 of the Code.

According to the evidence on file, the following grievances were submitted.

. In April 1986, CALPA filed three grievances with Nordair Ltd. challenging the non-assignment and non-recall of its members to operate Convair 580 aircraft; this operation had been entrusted to Nordair-Métro, a company newly formed to operate on routes previously operated by Québecair. This allegation overlapped in part those contained in CALPA's second application in 1986.

. In May 1988, CALPA filed a grievance with Québecair challenging the use of pilots from Nordair-Métro, which became Inter-Québec, instead of Québecair pilots, to serve the Lower North Shore. This allegation overlapped in part those contained in CALPA's third application filed in 1988.

. In April 1991, three grievances were filed with Intair challenging the non-recall or the non-use of Intair pilots by Inter 1991 following the alleged sale of business in 1991. These allegations overlapped in part the allegations contained in CALPA's fourth application filed in 1991.

CALPA did not proceed with the grievances from 1986 to 1988, which were never settled by parties nor submitted to arbitration. The 1991 grievances against Intair were settled by the parties on December 22, 1992.

## 2. Pre-hearing Meeting of April 15, 1994

When consideration of these applications resumed on April 15, 1994, Inter 1991, Intair and Corporation Intair were present, while the other employers originally involved were absent for the aforementioned reasons.

At that time, CALPA submitted a summary of the alleged facts and conclusions sought in all its applications. This document can be summed up as follows.

1. CALPA continued to seek findings of single employer and sale of business with reference to the employers and businesses involved in its 1986 and 1988 applications. In CALPA's view, its claims were still valid since the pilots working for Québecair at the time this company was dismantled and privatized had suffered, and were still suffering, the adverse effect of the transactions that had given rise to its applications; that is to say, the pilots had, at that time, been deprived of work and/or laid off contrary to the provisions of their collective agreement.

To justify maintaining all its claims, CALPA specified that the ensuing effects of the corporate changes that had occurred had to be assessed in chronological order and in relation to one another.

CALPA continued to seek the sale of business declaration sought in its 1991 application involving Inter 1991 as a successor employer, in whole or in part, of Intair and Corporation Intair Inc. since March 4, 1991. It contended, however, that those findings had to be made in light of the situations of fact and of law prior to 1991. In short, CALPA took the position, and still contends that, in 1991, Inter 1991 became not only the successor to Inter-Québec, but also the successor to Québecair and to all employers that succeeded that employer after 1986. CALPA accordingly claimed that Inter 1991 had to, and still must, assume the obligations arising from the successive sales with respect to the pilots that were working for Québecair in 1986. Consequently, what CALPA was, and is still, seeking in its 1991 application went beyond the immediate effects of the partial sale of business between Intair and Inter-Québec on which it bases this application.

CALPA requested that the Board authorize it to file grievances retroactively against Inter 1991, since that company had not complied with the collective agreement entered into with Intair following the 1991 transaction. It also



asked that the Board order Inter 1991 to compensate it for the salary lost by its members following their lay-off in 1991. These last two requests were not part of CALPA's original applications.

In response to CALPA's claims, Inter 1991 argued that to consider the merits of these applications after all these years would constitute a denial of justice, because most of the businesses and employers involved no longer existed and because it would be difficult to trace most of the witnesses precisely as a result of the time that had elapsed since the first application was filed in 1986.

The Teamsters agreed with Inter 1991's arguments concerning the practical impossibility of responding to CALPA's evidence in view of the time that had elapsed.

### 3. April 11 and 12, 1996 Hearings

These hearings followed Mr. Yves Proulx's report dated March 19, 1996. The parties had the opportunity to file their written submissions, which they supplemented orally on April 11 and 12, 1996 on the following questions which the Board had brought to their attention.

- . Do the delays in the processing of these cases, whatever the cause, affect the Board's jurisdiction to continue considering these cases and to rule on their merits?
- . Do the findings sought by CALPA concerning the retroactive filing of grievances and the payment of compensation by Inter-Canadian (1991) Inc. following the lay-off and non-recall of Intair Inc. pilots go beyond the remedies sought by CALPA prior to April 15, 1994? If so, should they be

the subject of a formal request for amendment by CALPA? Should the Board grant that request?

Subject to the answers to the foregoing questions, does the Board have jurisdiction to grant the remedies sought by CALPA in all these cases?

In Intair Inc. et al., *supra*, the Board found that a partial sale of business within the meaning of section 44 of the Code had occurred on March 4, 1991 between Intair Inc., Lignes aériennes Inter-Québec Inc. and Inter-Canadian (1991) Inc.; that Inter-Canadian (1991) Inc. was bound by the collective agreements that existed at the time of the sale between Intair Inc. and the IAM; and that this partial sale gave rise to the intermingling of the employees of Intair Inc. and Lignes aériennes Inter-Québec Inc. Do these findings apply mutatis mutandis to files 530-1956 and 585-426?

Let us point out that CALPA did not indicate at the hearing on April 11 and 12, 1996 that it was still seeking recourse against Intair et Corporation Intair, contrary to the position it had taken at the pre-hearing meeting of April 1994. For its part, the IAM attended only part of the hearings and filed no submissions.

#### 4. December 5, 1996 Hearing

During the deliberations that followed the April 1996 hearings, the question of whether the doctrine of the mootness of legal actions as defined by the Supreme Court of Canada in Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, was raised with respect to the 1986 and 1988 applications. As this was the first time the question was raised, the Board heard the parties' submissions on the subject on December 5, 1996.

## II

### Issues

Having heard the parties and reviewed all files, especially in light of the time it took to process these applications, which gave rise to a unique situation in which the Board must dispose of several applications, including one dating back to 1986, the Board identified as follows the questions it must consider in order to reach a full and final decision in all these files.

1. Must the Board hear and rule on the merits of the single employer and sale of business applications which were filed in 1986, 1988 and 1991?
2. Is CALPA's request for authorization to file grievances retroactively with Inter 1991 concerning alleged non-compliance with the collective agreements entered into with Intair valid?
3. Is CALPA's request for a Board order requiring that Inter 1991 compensate CALPA for the loss of income of its members following the lay-off of Intair pilots as a result of the sale of business in March 1991 valid?

## III

1. Hearing on the Merits of the Sale of Business and Single Employer Applications

The situation in the present cases, which essentially results from the time that has elapsed since these applications were filed, has led the Board to consider the approach it should take to examine them.

For this purpose, the Board considered the argument presented by Inter 1991 and the Teamsters to the effect that they would not be able to present an adequate defence, precisely because of the time elapsed and the consequences thereof, if the Board were to hear evidence and rule on the merits of those applications. Those consequences include the difficulty involved in appropriately responding to CALPA's evidence and presenting their own complete evidence, given that the employers involved in 1986 and 1988 have, for all intents and purposes, disappeared or cannot be traced.

The Board also considered the claim made by those parties that any Board decision allowing the applications would have such adverse consequences on the labour relations that it would jeopardize industrial peace at Inter 1991 and prove to be a major cause of injustice for the pilots represented by the Teamsters since 1987.

For its part, CALPA alleged that it would suffer an equally serious denial of justice, though for different reasons, if the Board refused to rule on its applications. This approach would in fact result in serious prejudice and injustice for its members, who would be unable to assert their rights, which have been repeatedly violated for several years.

It is clear to the Board that, whatever its decisions in these cases, they will be perceived by some as a cause of prejudice and injustice which undoubtedly would not have arisen if there had not been lengthy delays. In exercising its jurisdiction, however, the Board must first ensure that its decisions are ones that it may lawfully render and, second, that those decisions are fair, useful and unforceable in the labour relations context in which those decisions apply. In a case such as this in which delays, which a priori have nothing to do with the merits of the applications, have a decisive impact, the Board must ensure that the rights and interests of each party are respected in accordance with the objectives of sound labour relations and industrial peace provided for in the Code. It is in light of these objectives, and favouring a



concrete and practical approach, that the Board determined the approach it will take in ruling on CALPA's applications.

The Board decided to consider first the applications for declaration of single employer and then the applications for declaration of sale of business in chronological order of their filing.

A. Single Employer Applications

Before considering these applications, the Board asked the following question: **"Taking as proven the facts alleged by CALPA in all its single employer applications, would the Board now grant those applications?"**

This approach is not generally taken by the Board when dealing with this type of application, although it is not exceptional (see on this point Nolisair International Inc. (Nationair Canada) et al. (1992), 89 di 94 (CLRB no. 960)). In the present case, it proves to be a practical and fair way of proceeding. It gives the applicant assurance that all the evidence it would like to put before the Board will be taken as proven, analyzed and considered, while avoiding an exercise that could prove to be needlessly lengthy and costly if, upon analysing that evidence, the Board were to find that it would not grant the applications.

The Board always exercises its discretion with respect to declarations of single employer in keeping with its assessment of the labour relations purposes that such a declaration would make it possible to achieve. Therefore, granting that the five conditions for the application of section 35 of the Code have been met, the Board can determine whether the nature and objective of the labour relations purposes pursued by CALPA would allow it to grant the single employer applications.

In the present case, the consideration of the labour relations purposes that such a declaration would serve is particularly critical because of the effect of the elapsed time, of the presence of a second bargaining agent, the Teamsters, that was certified in 1987 to represent a group of pilots now working for Inter 1991, and of the effect of such a declaration on the bargaining rights at issue. Inter 1991 and the Teamsters submitted that single employer declarations would serve no labour relations purpose here, given the extremely long time elapsed since those applications were filed. On the contrary, such a declaration would destabilize the existing labour relations climate in the business.

In response to questions by the Board on this point, counsel for CALPA emphasized that the purpose of his client's applications was to restore to the most senior Québecair pilots' rights they had lost as a result of the various transactions between Inter 1991's predecessors, the purpose of which was to make a less costly collective agreement apply to those pilots. According to CALPA, the labour relations purposes that would enable the Board to exercise its discretion and to declare a single employer situation respecting various carriers that became part of the Inter-Canadian family would thus be to remedy the erosion of bargaining rights suffered by Québecair's former pilots.

The Board conducted a detailed review of the parties' arguments on this question and of its own case law dealing with labour relations purposes, which are fundamental to the exercise of its discretion respecting single employer declarations.

Following this analysis, the Board concluded that single employer declarations in the present cases would not serve the labour relations purposes provided for in the Code. It finds that, before exercising its discretion, it must take into account several factors and the rebalancing of those factors in order to ensure, in practice, the existence of conditions conducive to the exercise of the bargaining rights that must be reaffirmed. In short, in section 35 applications, and, as we will see below, the case law is consistent with this view; it is not enough for the Board to observe that bargaining

rights have been eroded, it must also restore them by placing them in a concrete labour relations context that makes it possible to realize the Code's major objectives.

In this case, CALPA's bargaining rights are indeed at issue, although the question of their exact scope is the question that a single employer declaration precisely seeks to determine. However, the representation rights of certain former Québecair pilots, which such a declaration would maintain and reaffirm, are also opposed to those of the pilots who have been represented by the Teamsters since 1987. The fact that these rights were acquired after those of CALPA, a situation which gave rise to consequences whose scope and extent are arguable, in no way lessens the requirement for the Board, in exercising its discretion, to consider the actual situation of the Inter 1991 pilots since the Teamsters acquired the right to represent the pilots working for Inter 1991's predecessor employers, i.e. Aviation Ltée and Nordair Métro.

The situation the Board is dealing with can be described as follows: its decision to uphold the bargaining rights of one bargaining agent certified to represent the pilots of Québecair and its successors can only be made to the detriment or at the expense of the rights of the bargaining agent in place at Inter 1991. In this respect, it differs considerably from the situations in Board decisions cited above, where maintaining the rights in no way involved challenging similar rights held by another agent certified by the Board. What was involved in those cases was an affirmation of those rights in respect of one or more employers affected by the relevant applications. However, the task of determining those rights, although difficult in itself, is nothing compared to that of determining how they are actually expressed in Inter 1991's labour relations context. Counsel for CALPA moreover admitted this fact in waiving CALPA's claim to replace the Teamsters as the bargaining agent at Inter 1991. CALPA is in fact attempting to reclaim the positions held by its members who, in its view, were unjustly laid off and dismissed over the years. (See transcript of April 12, 1996 hearing, pages 165 et seq.)

The Board first assumes that labour relations at Inter 1991 or its predecessors, if CALPA's claims are accepted, have not suddenly ceased to exist with the filing since 1986 of a host of applications that were supposed to go as far as the Supreme Court of Canada. During that period, the Teamsters and employers entered into and administered collective agreements in accordance with the rules of the legal system defined by the Canada Labour Code. The pilots represented by the Teamsters continued to give their support and, through them, adopted rules governing their conditions of employment and advancement. For its part, CALPA entered into a collective agreement with Intair on March 8, 1991 for the period from July 1, 1990 to December 31, 1992, as well as an agreement to settle certain grievances filed in 1991 following the March 4, 1991 transaction. This is the backdrop to any decision by the Board in 1996 to make declarations of single employer as CALPA had requested in 1986 and 1988.

Furthermore, the Board's case law reflects the significance of this reality. The Board's exercise of its discretion in this area is linked to the obligation to ensure the fulfilment of the whole of the objectives of the Code and is closely related to the conditions in which bargaining rights are exercised and to current labour relations practices at those employers that are the subject of such applications. The issue of preserving bargaining rights remains untouched under section 35, but the discretion conferred on the Board in this area is ultimately predicated on the requirement to do so based on labour relations realities.

Of course, maintaining bargaining rights is a fundamental aspect of a single employer declaration under section 35 of the Code. It is generally a matter of determining whether the unions' rights were involved or undermined by the employer's actions. These actions include cases of contracting out in which the applicant union asked the Board to make a single employer declaration (see Air Canada et al. (1993), 91 di 101; 18 CLRBR (2d) 295; and 93 CLLC 16,037 (CLRB no. 998); Nolisair International Inc. (Nationair Canada) et al., supra; and Muir's Cartage Ltd. and Canada Post



Corporation (1992), 89 di 12; 17 CLRBR (2d) 182; and 92 CLLC 16,060 (CLRB no. 955)).

Conversely, certain unions have at times invoked this provision of the Code in an attempt to increase their bargaining rights by circumventing the requirements of section 24 (BTS Buyers Transportation Systems Inc. et al. (1993), 91 di 69 (CLRB no. 995)) or to ensure they were maintained during a transition period (Intermountain Transport Ltd. (1984), 57 di 74; and 8 CLRBR (NS) 141 (CLRB no. 480)). In those cases, the Board refused to exercise its discretion either because it held that the applications did not meet the objectives contemplated by a single employer declaration or because, as in Intermountain Transport Ltd., *supra*, such declarations would have dealt with temporary situations. In this last decision, it is interesting to note the application for retroactive declaration filed with the Board by the union and the wording used by the Board to dismiss that application:

*"We do not think it necessary to decide whether we can make a declaration under section 133 with retrospective effect only. For even if we could, we would not, as a matter of our discretion, make a declaration in the present case. The union is seeking a declaration covering what is, essentially, a transition period. Commercial is now out of the picture as far as this Board is concerned. Section 133 is designed to deal with on-going situations, not situations where one employer moves out and the other moves in. Such circumstances are more appropriately considered under the sale of business provisions of section 144. We accordingly dismiss the section 133 application..."*

(pages 85; and 153)

These various decisions are of interest more for the approach used by the Board in the present case than the particular circumstances of each of those decisions which differ greatly from the circumstances in this case. All the above-cited decisions show that the Board's main concern with respect to its discretion remains the fulfilment of the Code's major objectives, particularly those relating to industrial peace and harmonious

labour relations. The Board recently demonstrated this concern in Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association (1996), as yet unreported CLRB decision no. 1155, when it dealt with the timeliness of an application filed by an employer under section 35.

In short, answering the question, as counsel for CALPA did, by saying that the Board would be reaffirming rights that were undermined by the actions of one or more employers settles the matter only partially since, as the case law indicates, such a declaration is not made in the abstract, but takes into account the actual situation of the business and the interests of the pilots represented by the Teamsters since 1987. It would be difficult in the present case to imagine how changing the ground rules for pilot assignments, promotions or lay-offs could bring about harmonious labour relations or industrial peace.

In this respect, single employer declarations pursuant to section 35 of the Code would likely create more problems than they would solve since, by attempting to reaffirm the rights of certain employees within a unit that is to be redefined, there would be a radical change in labour relations within the business. The Board would find it hard to justify exercising its discretion in such circumstances.

For these reasons, the Board reiterates that, even considering as proven all the facts alleged by the applicant in support of its applications, single employer declarations would not, in the present case, serve the labour relations purposes established by the Code.

#### B. Sale of Business Applications

As in the case of a single employer applications, the Board considered the approach it should take to examine sale of business applications in light of the conclusions

sought by CALPA, the time elapsed and the changes in the situations of the parties over the past 10 years.

The 1986 and 1988 applications were considered together, whereas the 1991 application was dealt with separately.

1. 1986 and 1988 Applications

CALPA maintains that the Board can and must issue the decisions that it would have issued if these cases had not been put in abeyance, a situation that gave rise to delays for which it cannot be held responsible. These decisions would make it possible to correct the adverse consequences caused to it and to its members by the legal and operational changes that occurred with successive employers over those years.

CALPA first alleged that, if the Board had heard these applications in chronological order and at the appropriate time, it would "probably" have allowed them and granted CALPA bargaining agent status under section 45. With respect to the 1986 applications, the Board would "undoubtedly" have determined that a single pilot unit was appropriate and would "undoubtedly" have certified CALPA as that unit's bargaining agent with the successor employer. This certification, again according to CALPA, would have enabled it to negotiate a collective agreement that would have protected its members against the job losses, losses that eroded its bargaining unit and occurred as a result of the Teamsters' certification at Québec-Aviation Ltée and Nordair Métro on July 17, 1987 and successive restructuring of the activities of the employers involved.

CALPA used the same reasoning with regard to its 1988 application: at that time, the Board would "undoubtedly" have granted its application for a sale of business declaration and, as per its 1986 application, would have confirmed its status as certified bargaining agent for a single pilot unit with the successor employer or

employers. CALPA alleged that, as would have been the case in 1986, it would have negotiated a collective agreement that would have guaranteed its members the rights and privileges of which they believe they have been deprived.

In response to the argument by Inter 1991 and the Teamsters to the effect that a ruling on these applications would constitute a violation of the rules of natural justice, CALPA claimed that the evidence necessary to rule on those applications is essentially the documentary evidence already on file, to which all the parties have access. However, CALPA indicated it intended to supplement this documentary evidence by calling witnesses to testify on all essential facts.

It should be emphasized at the outset that, in considering the present applications, the Board cannot ignore the events that have influenced matters since 1986 or the ensuing changes in the parties' situations. The Board cannot go back and attempt to do what was not done and actually resolve today the difficulties that those sales of businesses may have caused over all those years. The Board must also take into account all the consequences flowing from the application of sections 44 and 45 of the Code in light of the remedies sought by CALPA.

In examining these applications, the Board considered the following factors in determining whether it should rule on the three applications filed in 1986 and 1988.

. The effect of sale of business declarations that it could make pursuant to section 44. For this purpose, the Board first took into account the rule according to which the effects of a sale of business under the Code are immediate and automatic (see Halifax Grain Elevator Limited (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867); and Reuters Information Services (Canada) Limited and Starfish Systems Inc. (1995), 99 di 64 (CLRB no. 1138)).



. The effect of the decisions the Board could issue under section 45 in deciding certain questions arising from these sales, particularly in determining bargaining units and the representation rights of the unions involved. Declarations that sales of business had occurred in 1986 and 1988, sales which would have the effects provided for in section 44(2), would be conditional in the present cases on the application of section 45, in light of the presence of more than one bargaining agent and the absence of any agreement reached between the parties on the outcome of the dispute arising from the application of section 44.

. The outcome of the grievances filed by CALPA between 1986 and 1988 to ensure respect of the rights of its members under the collective agreements entered into with Nordair Ltd., Québecair and Intair which would apply under section 45(1)(b), as the case may be, if the Board decided that CALPA were the bargaining agent.

According to CALPA, consideration, in this context, of the manner in which the Board should rule today on its 1986 and 1988 applications, that is to say in the same way it would "probably" have ruled on them at that time, and of the impact of those decisions on the application of sections 44 and 45 show that any Board intervention would ultimately have no practical effect for the purpose of ruling on the merits of these cases.

Let us first examine CALPA's claims and, for that purpose, let us start with the assumption that the decisions the Board would have issued in ruling on CALPA's applications would all have been in CALPA's favour. Specifically, let us imagine that the Board determined that the pilots constituted only one bargaining unit in both 1986 and 1988. Let us also assume that the Board certified CALPA for this bargaining unit at the successor employer in 1986 and 1988. As the last element in this scenario, let us suppose that this unit was not raided and that CALPA remained the bargaining agent of those pilots from 1986 to 1991.

Under the circumstances, and leaving aside for the moment the question of whether it is in the slightest way realistic to imagine that all the elements of this scenario could have come together at the same time, given the presence of the Teamsters, which were certified to represent the pilots affected by these sales, let us see what would have been the outcome of this scenario. Again according to CALPA, it could have played its role fully as a bargaining agent with respect to the pilots' rights it considered had been infringed upon as a result of these sales from 1986 to 1988. Those rights could purportedly have been asserted, in accordance with the logic of sections 44 and 45 of the Code, through the filing and subsequent processing of grievances against the actions of the successor employers and through the negotiation of collective agreements with them.

However, in the present cases, there is no grievance CALPA could refer to arbitration to seek remedy for the alleged violations by the successor employers at the time of the organizational changes in 1986 and 1988, violations which resulted in the laying off of its members and the erosion of its bargaining unit. In fact, CALPA did not pursue the grievances filed in 1986 and 1988.

In addition, given the elapsed time and the disappearance of the employers involved in 1986 and 1988, we cannot imagine that CALPA could acquire, through collective bargaining, the rights that it can no longer claim through the grievance procedure. Nor, for the same reasons, could it claim to require Inter 1991, the last successor employer as we will see below, to negotiate retroactively and to apply conditions of employment that the successor employers could have negotiated in 1986 or 1988 and that they did not negotiate.

In this context, it is important to bear in mind the limited nature of the Board's powers under section 45. The Board does not have general powers to settle all disputes arising from a sale of business, such as a new employer's refusal to hire the seller's employees or the lay-off of those employees in violation of the applicable

collective agreement as a result of the sale. The Board therefore has no jurisdiction to declare under section 45(4) that all the pilots affected by the sale have, for example, the right to demand to be hired by the successor employer in accordance with the seniority principle, without regard to the provisions of the collective agreement, as CALPA claimed in its 1991 application.

A section 45 order determines the rights of the parties with respect to bargaining units and union representation, but it does not have any immediate remedial effect on the alleged violation of rights under the collective agreement that applies under section 45(1)(b), if a sale of business declaration were made in accordance with section 44 and if the conditions for the application of section 45 were met.

In light of its analysis, and considering the facts as proven, the Board concluded, subject to the above assumptions and uncertainties, that a decision to allow all of CALPA's applications and to acknowledge that CALPA had bargaining agent status in 1986 and 1988 would have no practical effect on the rights of CALPA's members. The absence of means, either the grievance and arbitration procedure or the possibility of collective bargaining, means that in the particular circumstances of the present cases are essential to give effect to the Board's decisions under sections 44 and 45, the time elapsed and the consequences of the events of 1986 and 1988 on the rights and obligations of all the parties affected by the successive restructuring of the employers' operations do not allow the Board to rule on the questions that arise under section 45. In short, if the Board allowed CALPA's applications, it could not decide in a realistic, concrete and effective manner the questions that it is permitted under section 45 to determine for the purposes of section 44.

For these reasons, the Board found that the 1986 and 1988 applications for a sale of business declaration and, consequently, the decisions that it could issue if it had to rule on those matters are moot. It therefore decided to exercise the discretion that the doctrine of mootness developed by the Supreme Court of Canada grants a tribunal for

refusing to hear a case where the conditions for the application of that legal doctrine are met.

This rule is defined as follows by the Supreme Court of Canada in Borowski v. Canada (Attorney General), supra:

*"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.*

*The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The case do not always make it clear whether the term 'moot' applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the 'live controversy' test. A court may nonetheless elect to address a moot issue if the circumstances warrant."*

(page 353; emphasis added)



The facts and rules of law that apply to the present applications have convinced the Board to exercise its discretion to refuse to consider the 1986 and 1988 applications.

In light of this decision not to rule on the 1986 and 1988 applications, the Board need not rule on the argument raised by Inter 1991 and the Teamsters concerning compliance with the rules of natural justice.

## 2. 1991 Application

The Board decided that there are grounds to rule in a full and definitive manner on this application.

### A. Elapsed Time and Rules of Natural Justice

The respondent and the mis-en-cause cannot successfully claim that the time elapsed since this application was filed in May 1991 prevents the Board from ruling on this application while complying with the rules of natural justice.

The matters at issue in this application are essentially the same as those raised by the same parties in an application for a sale of business declaration filed by the IAM on May 3, 1991 (files 530-1955, 560-259 and 585-425). That application essentially alleged the same facts and relied on the same elements of law as CALPA's application in claiming that a sale of business had occurred in 1991 between Intair and Inter-Québec, which later became Inter 1991. The IAM submitted, as did CALPA, that the certification it held to represent, among others, Intair's mechanics and ground employees and the collective agreement entered into with that company were binding on Inter 1991. That case involved CALPA, the Teamsters and the same employers as those affected by CALPA's 1991 application.

The IAM's application is of crucial interest in considering the 1991 application, for the following reasons.

- . The Board heard this application at a public hearing starting in May 1991 and allowed it on September 13, 1993 (see Intair Inc. et al., *supra*).
- . The same parties as those affected by CALPA's 1991 application were involved in those cases. Besides the IAM, Intair, Inter-Québec, 2847-8451 Québec Inc. (whose legal name is Inter 1991), the Teamsters and CALPA took an active part in the hearings.
- . At the hearings, all parties admitted that a partial sale of business within the meaning of the Code had occurred between Intair and Inter-Québec, which then became Inter-Canadian (1991), hereinafter call Inter 1991. CALPA expressed reservations during the discussions that gave rise to this admission. However, its reservations did not concern the existence of the sale of business, but rather the effect of this admission by Inter 1991 on the scope of the conclusions sought in CALPA's 1991 application.
- . In light of this admission, the only remaining matter the Board had to decide was the date of the transaction that gave rise to the sale of business between Inter and Inter-Québec. The Board found that this sale had occurred on March 4, 1991, and it consequently held that Inter-Québec, or Inter 1991, was bound by the certifications held by the IAM and the collective agreements entered into by the IAM and Intair.

Thus, not only has the Board already heard lengthy evidence on the nature, conditions, scope and the effects of the transaction between Intair and Inter-Québec on March 4, 1991, but it has also been admitted that the acquisition of some of

Intair's assets constituted a partial sale of business. The Board described the scope of that sale as follows in Intair Inc. et al., supra:

*"... This partial sale consisted in the acquisition through the corporate intermediary of Inter-Québec of all the components related to the operation of the scheduled services of the company called Intair Inc. This also included both the tangible and intangible assets related to this operation."*

(page 94)

Before making this observation the Board declared:

*"... Put briefly, the reality was that Inter-Canadien was in fact continuing the scheduled services that had been operating, until the eve of the takeover, under the name Lignes Aériennes Intair. However, Regional had decided to stop using Intair's F-100 jet aircraft on these routes and to increase Inter-Québec's fleet of ATR-42 turboprop aircraft."*

(page 89)

However, CALPA essentially based its claims on that transaction, which the Board had already found to be a partial sale of business within the meaning of the Code, and all parties affected by the 1991 application were familiar with the evidence and legal arguments on which the Board had relied. In the circumstances, the Board considers that Inter 1991 and the Teamsters cannot argue that they could not defend themselves in connection with this application. It concludes that it can rule on this application and, if necessary, receive any relevant evidence that the parties may put before it.

The question that arises then is precisely what evidence that could be. It is out of the question that the Board rehear lengthy evidence on the same questions and facts concerning the same parties. The Board files concerning the IAM (530-1955, 560-259

and 585-425) are directly related to this application and are strictly speaking before the Board.

That being said, the parties raised many questions and expressed many reservations concerning the exact scope of the finding of a partial sale of business by the Board in Intair Inc. et al., *supra*. A large portion of the exchanges between the parties and the Board at the April 11 and 12 hearings dealt with these questions. In the circumstances, this panel feels it is appropriate to conduct a detailed analysis of the evidence that served as a basis for the 1993 decision mentioned above in order to determine whether it must consider this evidence insofar as it proves to be relevant, in deciding the present case, and whether there is any reason to apply the findings of that decision to CALPA's application.

To this end, the Board intends to give its understanding of the facts relating to the 1991 application for declaration of sale of business and of their legal consequences and any conclusions that it may draw from those facts. It will do so *inter alia* on the basis of a consideration of all related files, specifically the documentary evidence and testimony entered into the IAM's files regarding the existence of a partial sale of business between Intair and Inter-Québec. This approach is not unusual and has been adopted by the Board on a number of occasions: T.E. Quinn Truck Lines Ltd. (1982), 47 di 87 (CLRB no. 362); William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 111; and 84 CLLC 16,054 (CLRB no. 476); Nordair Ltd. (1985), 62 di 88; 10 CLRBR (NS) 107; and 85 CLLC 16,051 (CLRB no. 525); Rapide Transport Inc. (1986), 64 di 135 (CLRB no. 561); Voyageur Inc. (1989), 77 di 14; and 90 CLLC 16,021 (CLRB no. 732); and Iberia Airlines of Spain (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796).

B. Existence of a Partial Sale by Intair to Inter-Québec and the Operation of the Regular Flight Service



1. Parties' Positions

Inter 1991 claimed that the Board's finding in Intair Inc. et al., supra, that the March 4, 1991 transaction constituted a partial sale within the meaning of the Code does not apply to the sale of business application filed by CALPA in 1991. In its view, this transaction did not include the purchase or transfer to Inter-Québec, and eventually to Inter 1991, of the regular flight service that was then operated by Intair using Fokker-100 aircraft since it had not purchased those aircraft.

Inter 1991 admitted, however, that it had purchased from Intair certain assets such as counters, hangars and other equipment of this type used by Intair inter alia for its regular flight operations, and that it had hired Intair's staff assigned to those operations in various regions of Quebec. It also admitted that the number of regular flights that Inter-Québec operated prior to March 4, 1991 using ATR-42 turboprop aircraft was increased on certain routes operated by Intair. This increase required additional ATR-42 aircraft and occurred at the same time and proportionally to the gradual discontinuance of Intair's regular flight operations, which terminated on May 31, 1991.

On this point, however, Inter 1991 claimed that it had simply continued to operate its "turboprop aircraft business," while increasing its volume of activity, and that it had not purchased Intair's "jet aircraft business." This is why Inter 1991 submitted that it had not purchased Intair's regular flight operations and that therefore there was no sale of business within the meaning of section 44 of the Code and it was not bound by the collective agreement entered into by CALPA and Intair with respect to Intair's pilots assigned to the operation of Fokker-100 jets.

The Teamsters adopted the same position and agreed with Inter 1991's arguments.

CALPA submitted that there was a partial sale of business and that the purpose of that sale was to operate Intair's regular flight service, which it admitted during the public hearings in the IAM files (see transcript of hearings of June 19, 1991, pages 137 to 140, and December 15, 1992, pages 7, 8 and 13). CALPA further submitted that Inter 1991 continued to operate Intair's regular flight service with Intair pilots, among others.

With respect to the number of Intair pilot positions affected by this sale, CALPA confirmed for the Board during the hearings of April 11 and 12, 1996 that it was prepared to admit that 28 positions had been involved. However, CALPA maintained that the positions that were posted following the sale should have been 28 captain positions, not 14 captain positions and 14 first officer positions. If such had been the case, all positions would undoubtedly have been filled by its members. Consequently, CALPA claimed that its members had been deprived of employment opportunities, and requested that the Board rule on this question.

Furthermore, CALPA claimed that the 28 captain positions should also have been offered to Intair pilots based in France at that time.

## 2. Board's Observations

After reviewing the arguments and the relevant evidence brought to its attention in the CALPA and IAM files, the Board first notes that the main facts and questions it must consider in dealing with CALPA's application are the same as those that were the subject of lengthy evidence in Intair Inc. et al., supra.

The Board also notes that those facts were the subject of admissions by counsel for Intair, Inter-Québec and Inter 1991, Luc Beaulieu (who was eventually replaced by Michel Towner for Inter 1991), by counsel for the Teamsters, Gino Castiglio, and counsel for CALPA, John Keenan, as well as of the testimony of the Intair and Inter

1991 agents. At the June 19, 1991 hearing, Mr. Castiglio admitted that there had been a partial sale of business between Intair and Inter 1991 on June 1, 1991 (see transcript of June 19, 1991 hearing, page 166). Mr. Keenan did the same (see transcript of hearing of June 19, 1991, pages 136-140, and of December 15, 1991, pages 7, 8, 12 and 13). We examined the admissions by counsel for the employers in greater detail by reviewing the main evidence that was entered in the IAM file and that is relevant to a consideration of CALPA's 1991 application. This evidence establishes the following.

. Between March and May 1991, Intair gradually abandoned the routes it was serving with Fokker-100 jets as part of its regular flight service. It discontinued these routes on May 31, 1991 and agreed not to operate this type of service for a three-year period. (See Intair Inc. et al., supra, at pages 89 and 93.)

. Starting on June 1, 1991, Inter 1991 resumed its flight operations using ATR-42 aircraft. (See the Board's description in Intair Inc. et al., supra. See also the admissions by Luc Beaulieu at the hearings of June 19, 1991, pages 125, 133 to 137, and of July 31, 1991, pages 30 et seq., as well as Denis Tremblay's testimony of August 1, 1991, pages 96 and 98 to 102.)

. To continue operating this service, Inter 1991 used equipment, ground personnel and flight personnel (flight attendants and pilots) previously assigned to the operation of this service with Intair. This was the thrust of Mr. Beaulieu's admissions, according to which the partial sale of business between Intair and Inter-Québec corresponded to the increase in unionized labour at Inter 1991, that increase being equivalent to the proportion of unionized labour that was hired by Inter 1991 and came from the various existing bargaining units at Intair, including the pilots. (See Luc Beaulieu's admissions at the hearings of June 19, 1991, pages 125, 133 to 137, and of July 31, 1991, page 30, as well as Denis Tremblay's testimony of August 1, 1991, pages 100 to 102.)

. By way of Mr. Beaulieu's admissions and, in particular, Mr. Tremblay's testimony of August 1, 1991 and December 16, 1992, Inter 1991 acknowledged that the added regular flights were operations formerly carried out by Intair, and that the employers affected, that is to say Intair and Inter 1991, had conceded that the employees involved, including the pilots, had rights that had to be acknowledged by the new employer, Inter 1991.

. In response to Mr. Beaulieu, who asked him to explain why former Intair pilots ended up at Inter-Québec, which later became Inter 1991, prior to June 1, 1991, Mr. Tremblay stated:

"... Well, under the terms of the transaction with Canadian Regional, Intair Inc. had to cease its scheduled flight operations throughout Quebec. In so doing, at that time, around, let's say, mid-March, it was known that the purchaser, Inter-Canadian, intended to replace the network-wide operations that Intair carried out with an equivalent number of seats and so on and, in so doing, a portion of Intair's operations became subject, as I believe was said here, to a de facto transfer to the purchaser, Inter-Canadian.

...

Following discussions with the management of Inter-Canadian, the employers agreed to acknowledge that Intair's operations throughout the Quebec network had in fact been transferred to Inter-Québec.

You will remember from what I have already explained that, during this period, starting with the transaction, I think it was March, April or May, Intair operated 4 Fokker-100s for the Quebec network. Inter-Canadian said it intended to add 4 aircraft to the 8 ATR-42s already in service, thereby increasing the number to 12 ATR-42s on June 1. As a result, 4 F-100s were replaced by 4 ATR-42s on the routes served by the F-100s, with the passengers that were in the F-100s. So this became a difficult question that had to be resolved.

...

... So, necessarily, when you add 4 aircraft at Inter-Québec and increase the number from 8 to 12, you definitely need pilots, you



definitely need flight attendants and you definitely need mechanics. Since those operations were acknowledged by the purchaser as being former Intair operations, an agreement was reached with them, although the employees who were affected by this change at Intair had rights that had to be recognized at Inter-Canadian."

(transcript of August 1, 1991, pages 98, 99 and 101; translation; emphasis added)

- . It was in those circumstances that pilots working for Intair were offered 28 pilot positions, a number corresponding to the proportion of Intair's regular flight operations transferred to Inter-Québec.
- . The positions were posted and awarded by order of seniority to former Intair pilots who had applied and, on a priority basis, to Inter 1991 pilots who were laid off at that time (see Denis Tremblay's testimony of December 16, 1992, pages 118 and 119).
- . Under an agreement between Intair and Inter-1991, former Intair pilots received training in order to fly ATR-42 aircraft.
- . Inter 1991 recognized all their seniority and the pilots were integrated into the Inter 1991 pilots' seniority list in accordance with the one-for-one rule.
- . The collective agreement in effect at Inter 1991, which was signed by the Teamsters for the pilots, was applied to these former Intair employees (see Denis Tremblay's testimony of August 1, 1991, page 216).

### 3. Board's Conclusions Concerning a Sale of Business in 1991

What conclusions of fact and law can the Board draw today from the evidence entered in the IAM files in connection with CALPA's 1991 application for a declaration of sale of business?

The Board first notes that, on March 4, 1991, two separate legal entities, Intair and Inter-Québec, both of which, prior to that date, had operated charter and regular flight operations in discrete proportions using different types of aircraft, entered into a business transaction whereby one of those entities, Intair, sold to the other, Inter-Québec, which became Inter 1991, a portion of its business, that is to say its regular flight operations. This sale resulted in the purchase of Intair's equipment, excluding its jets, and the transfer of personnel of all categories, both ground and flight personnel, assigned to the operation of this portion of Intair's business. Intair nevertheless retained its charter flight operations, as well as the necessary equipment and personnel to carry it on.

The fact that Inter 1991 in the present case did not purchase the Fokker-100 aircraft used by Intair for its regular flights, but rather chose to continue operating those flights by adding an equivalent number of ATR-42 turboprop aircraft, replacing the aircraft used by Intair in serving the same passengers, is not determinative of the question of whether there was a partial sale of business between Intair and Inter 1991. The fact that the purchaser, Inter 1991, chose for operational, economic or other reasons not to purchase a portion of the equipment used by the seller and to use only turboprop aircraft to carry on the portion of the business previously operated by Intair does not demonstrate that it did not acquire Intair's regular flight operations. In this respect, the distinctions suggested by Inter 1991 and the Teamsters between a "jet aircraft" business and a "turboprop aircraft" business do not support their claim that there was not a partial sale of business. The March 4, 1991 transaction did not involve a business that was defined in terms of equipment type, but rather in terms of a viable and severable commercial activity, "a going concern" as defined by the Board. (See Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402); and Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792); and the Board's remarks in Intair Inc. et al., *supra*, at pages 90 to 93.)

All these facts show that Intair's regular flight operations were an integral part of the March 4, 1991 transaction, and that the sale of this portion of Intair's business constituted a sale of business within the meaning of section 44 of the Code. Therefore, the Board's finding in Intair Inc. et al., supra, that Intair's regular flight operations were sold to Inter 1991 applies in the present case.

The Board further notes that former Intair pilots, who were hired and integrated into Inter 1991's pilot group in accordance with their seniority and were covered by the Teamsters' collective agreement, were then intermingled within the meaning of section 45(1) of the Code with the Inter 1991 pilots once the sale was signed and carried out.

This intermingling of the pilots raises the question of the application of sections 45(1)(a) and (b), under which the Board must decide whether Inter 1991 pilots should constitute one or more bargaining units and which union should be the bargaining agent. Before considering this question, however, we must first deal with the questions relating to the classification of the 28 Intair pilot positions affected by the sale and determine whether Intair pilots based in France should have been able to apply for those positions.

#### 4. Classification of Pilot Positions Affected by the 1991 Sale of Business

In April 1991, following the sale, 28 pilot positions at Inter 1991, that is 14 captain positions and 14 first officer positions, were posted and offered to Intair pilots. In fact, 13 captain positions and 3 first officer positions were filled by CALPA members after they had received training in order to fly ATR-42 aircraft.

At the December 15, 1992 hearing in the IAM files, Mr. Keenan indicated that CALPA now agreed that the number of pilot positions affected by the sale was in fact 28, or that is to say 14 crews of 2 persons. The crews in this instance consisted of a captain and a first officer. (See Mr. Keenan's admissions at the December 15, 1992

hearing, pages 7 and 12.) On April 11 and 12, 1996, CALPA confirmed that 28 positions were affected by the 1991 sale.

The Board considered the question of the classification of the positions offered having regard to the general context of the present cases and, in particular, to Mr. Keenan's statement at the December 15, 1992 hearing. His remarks as well as the content of the pilot position postings in the spring of 1991 lead the Board to believe that CALPA had agreed that not all positions were captain positions. It is true that, at the time, CALPA had grieved the lay-offs of Intair pilots in view of the insufficient number of positions offered, but those grievances apparently did not pertain to classification. In any case, the grievances were settled on December 22, 1992 as part of an agreement with Intair. For this reason, the Board finds that the 1991 sale of business involved 28 Intair pilot positions, i.e. 14 captain positions and 14 first officer positions.

The Board does not accept CALPA's claim that these positions should also have been offered to the pilots based in France. The conditions of employment of those pilots were defined in part by a letter of understanding dated April 17, 1989, which provided *inter alia* that these pilots could not apply for any position in Canada until their assignments abroad had come to an end. Furthermore, at no time did CALPA grieve the fact that the employer had not offered the pilots based in France the opportunity to apply for these positions. In fact, there was only one such grievance filed by a pilot based in France which was settled at the time of the December 22, 1992 agreement. (See Mr. Keenan's written submissions dated March 27, 1996.)

For these reasons, the Board does not believe that Inter 1991's decision not to afford the pilots based in France the opportunity to apply for the 28 captain and first officer positions must be reconsidered today.



5. Application of Sections 45(1)(a) and (b) of the Code

Having regard to the foregoing conclusions as to the existence of the sale of business and the intermingling of Intair and Inter 1991 pilots, the Board must now return to the outstanding questions concerning the application of sections 45(1)(a) and (b).

On this point, the Board finds that all pilots working for Inter 1991 constituted an appropriate bargaining unit. In fact, all these pilots perform the same type of duties and share the same community of interests required to constitute only one bargaining unit.

As to the identity of the bargaining agent, the Board finds that the Teamsters must be certified as this unit's bargaining agent. At the time of the sale of business, the Teamsters represented a sufficient majority of pilots working for Inter 1991, including Intair pilots, to conclude that a representation vote to ascertain the wishes of the employees involved would have been a futile exercise. Since then, Inter 1991 and the Teamsters have negotiated and signed collective agreements for this bargaining unit and there is no reason today to believe that a representation vote among the pilots working for Inter 1991 would result in a change of bargaining agent.

6. Findings Concerning CALPA's 1991 Application

Having regard to the foregoing, the Board is now in a position to rule definitively on the 1991 application without hearing further evidence.

In short, the Board makes the following finding concerning CALPA's 1991 application.

. The March 4, 1991 transaction between Intair and Inter-Québec constitutes a partial sale of business within the meaning of section 44 of the Code.

- . As a result of that sale, Inter 1991 pilots and Intair pilots were intermingled within the meaning of section 45 of the Code.
- . These pilots constitute an appropriate bargaining unit within the meaning of the Code.
- . The Teamsters must be certified as this unit's bargaining agent.

2. CALPA's Request for Authorization to File Grievances Retroactively With Inter 1991

The Board must now rule on this request, which does not appear in the 1991 application and which CALPA submitted to the Board at the pre-hearing meeting of April 15, 1994.

CALPA would like the Board to authorize it to file grievances alleging that Inter 1991 violated the seniority provisions of the collective agreement entered into with Intair, violations that allegedly occurred when the pilots represented by CALPA were laid off following the March 4, 1991 transaction.

The Board asked the parties to file their submissions on this question and, in particular, to indicate whether there was any ground to consider this request as an amendment to the 1991 application. The Board considered these submissions and decided to dismiss CALPA's request for the following reasons.

When CALPA filed its application dated May 3, 1991, it had already submitted grievances to Intair in April 1991 concerning the same matters as are here at issue.

On December 22, 1992, CALPA entered into an agreement with Intair, in order inter alia to settle all the grievances it had filed at the time of the events surrounding the

sale of business. At that time, and at the time it filed grievances with Intair, CALPA was aware of the facts on which it now wants to base the grievances that it would like to be authorized to file against Inter 1991. However, at no time prior to April 15, 1994 did CALPA make a request to file grievances retroactively. Furthermore, it provided no reason for the lateness of its application or any reason justifying the Board's not taking that lateness into account.

In addition, we do not accept CALPA's argument that a union and an employee may not file grievances based on events that allegedly occurred at the time of a sale of business before the Board rules on this sale of business application and identifies the successor employee. This approach runs counter to the interpretation given to date of the effects of a sale of business under the Code, which are immediate and automatic. (See Halifax Grain Elevator Limited, *supra*; and Reuters Information Services (Canada) Limited and Starfish Systems Inc., *supra*.) The automatic nature of the effects of a sale of business implies that any grievance concerning an alleged violation of a collective agreement must be made within a time period provided for in that collective agreement, without awaiting a Board decision under section 44.

The Board does not believe that sections 44 and 45 authorize it to issue the type of order sought by CALPA in these circumstances. There are no allegations of unfair practice by Inter 1991, which, for example, would have prevented CALPA from taking action and filing grievances at the time the violations of the collective agreement occurred, allegations that could have prompted the Board to authorize the filing of grievances as a remedy under section 99 of the Code.

Consequently, there is no reason to allow CALPA to amend its 1991 application to authorize it to file grievances retroactively.

3. Is CALPA's Request for a Board Order Requiring Inter 1991 to Compensate It For the Loss of Income of Its Members Following the Lay-off of Intair Pilots As a Result of the Sale of Business in March 1991 Valid?

CALPA's request seeking the Board's intervention in ordering Inter 1991 to compensate CALPA for the loss of income of its members as a result of the sale of business on March 4, 1991 is not valid.

If as CALPA claims, it is true, that certain Intair pilots were laid off contrary to the provisions of the existing collective agreement, the grievance procedure is the proper recourse for challenging those lay-offs and their consequences, specifically the loss of salary and CALPA did use the procedure at the time. However, it settled those grievances under the December 22, 1992 agreement entered into with Intair. Furthermore, at no time did CALPA file a grievance with Inter 1991 challenging the lay-offs of Intair pilots and claiming *inter alia* payment of salary lost by those pilots.

CALPA's request for a Board order requiring compensation from Inter 1991 does not come under the Board's jurisdiction pursuant to sections 44 and 45 of the Code. CALPA did not use the proper procedure at the appropriate time and the Board cannot, in the present cases, remedy this situation as requested by CALPA.

#### IV

#### General Conclusion

For the reasons given above, the Board makes the following determinations.

- (A) 1. It dismisses the applications for a declaration of single employer and sale of business filed on August 12, 1986 (files 530-1395, 560-137 and 585-163).



2. It dismisses the applications for a declaration of single employer and sale of business filed on September 11, 1986 (files 530-1403, 560-142 and 585-168).
3. It dismisses the applications for a declaration of single employer and sale of business filed on June 16, 1988 (files 530-1629, 560-194 and 585-238).
4. It allows the application for a declaration of sale of business filed on May 3, 1991 (files 530-1956, 585-426).
5. It dismisses CALPA's request for authorization to file grievances retroactively against Inter 1991.
6. It dismisses CALPA's request for compensation from Inter 1991 for loss of income by its members as a result of the lay-offs in 1991.

AND

- (B) It finds that Intair and Inter 1991 pilots were intermingled within the meaning of section 45(1) of the Code following the sale of business on March 4, 1991 and that all the pilots working for Inter 1991 constitute an appropriate bargaining unit.

AND

- (C) It certifies the Teamsters as the bargaining agent of the following bargaining unit:

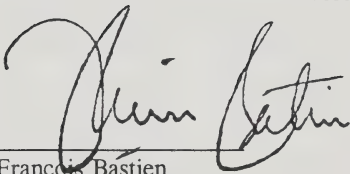
"all pilots and co-pilots working for Inter-Canadian (1991) Inc.,  
excluding the chief pilot and those above."

An order will follow shortly.



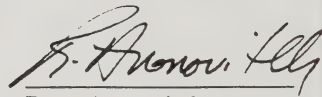
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Louise Doyon  
Vice-President



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François Bastien  
Member



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Roza Aronovitch  
Member

# information

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## Summary

International Longshoremen's and Warehousemen's Union, Local 400, on behalf of Michael Linke, *applicant*, and Island Tug & Barge Limited, Standard Towing Ltd. and Canadian Merchant Service Guild, *respondents*.

Board File: 745-5376  
CLRB/CCRT Decision no. 1198  
March 3, 1997

Island Tug & Barge Limited ("ITB") and Standard Towing Limited ("Standard") consolidated their operations on December 30, 1995. At the time, the International Longshoremen's and Warehousemen's Union Local 400 ("ILWU") was certified to represent the **unlicensed** employees of Standard while the Canadian Merchant Service Guild ("Guild") was certified to represent Standard's **licensed** employees as well as **all the employees of ITB**. The consolidated operation was run as one under ITB and immediately after the consolidation an intermingled seniority list was prepared and ITB conducted its operations and individual employees were assigned work on the basis of the intermingled seniority list under the umbrella of the Guild's representation.

Consequent thereon, the Guild wrote to ITB on January 29, 1996, and requested that the five former employees of Standard become Guild members pursuant to the union security clause contained in the collective agreement between the Guild and ITB. The employer raised the issue with Linke who refused to join the Guild. A subsequent request by the Guild was similarly responded to by Linke. In

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## Résumé

Syndicat international des débardeurs et magasiniers, section locale 400, au nom de Michael Linke, *requérant*, ainsi que Island Tug & Barge Limited, Standard Towing Ltd. et Guilde de la marine marchande du Canada, *intimées*.

Dossier du Conseil: 745-5376  
CLRB/CCRT Décision n° 1198  
le 3 mars 1997

Island Tug & Barge Limited («ITB») et Standard Towing Limited («Standard») ont regroupé leurs activités le 30 décembre 1995. À l'époque, la section locale 400 du Syndicat international des débardeurs et magasiniers («SIDM») était accréditée pour représenter les employés **non brevetés** de Standard, tandis que la Guilde de la marine marchande («Guilde») était accréditée pour représenter les employés **brevetés** de Standard ainsi que **tous les employés de ITB**. Les activités regroupées ont par la suite été poursuivies sous le nom de ITB et, immédiatement après le regroupement, une liste commune d'ancienneté a été établie et ITB a exercé ses activités et affecté les employés en fonction de cette liste ainsi que de la représentation par la Guilde.

Cela étant, la Guilde a écrit à ITB le 29 janvier 1996 et demandé que les cinq anciens employés de Standard deviennent membres de la Guilde aux termes de la clause de sécurité figurant dans la convention collective conclue par la Guilde et ITB. L'employeur en a parlé à M. Linke qui a refusé de devenir membre de la Guilde. Ce dernier a répondu de la même façon à une

accordance with the requirements of the collective agreement which it deemed to be in force with the Guild, and believing it was left with no alternative, the employer terminated Linke's employment on March 6, 1996.

On July 31, 1996, the Board issued an order pursuant to section 45 directing that the intermingled employees at Island Tug and ITB be represented by the Guild under the terms of the collective agreement pursuant to which it required Linke's termination.

The ILWU filed a complaint against ITB and the Guild alleging breaches of sections 94(1)(a), 95(g) and 96.

The Board determined that ITB was guilty of a breach of section 94(1)(a) of the Code insofar as, until the Board's order of July 1996 issued, the ILWU, pursuant to section 44 of the Code, continued to represent Standard's former unlicensed employees and its collective agreement continued to govern the terms and conditions of employment of those employees. Accordingly, on the date of his termination Linke was still represented by the ILWU and covered by its collective agreement. He was therefore neither bound by the Guild's collective agreement nor obliged to join it as a condition of continued employment with ITB. In the circumstances, notwithstanding that the employer's decision to terminate Linke was not tainted by anti-union animus and that it was based on a misinterpretation of the provisions of the Code, its conduct in terminating him for failure to join the Guild while the collective agreement of the ILWU remained in place constituted a breach of section 94(1)(a) of the Code.

demande subséquente de la Guild. Conformément aux dispositions de la convention collective qu'il estimait le lier à la Guild, et croyant qu'il n'avait pas d'autre choix, l'employeur a mis fin à l'emploi de M. Linke le 6 mars 1996.

Le 31 juillet 1996, le Conseil a rendu, en vertu de l'article 45, une ordonnance selon laquelle les employés regroupés d'Island Tug et de ITB étaient représentés par la Guild conformément aux dispositions de la convention collective aux termes desquelles cette dernière avait exigé de mettre fin à l'emploi de M. Linke.

Le SIDM a déposé une plainte contre ITB et la Guild, alléguant violation des paragraphes 94(1)a) et 95g) ainsi que de l'article 96.

Le Conseil estime que ITB est coupable de violation de l'alinéa 94(1)a) du Code parce que, jusqu'à ce qu'il rende son ordonnance en juillet 1996, le SIDM continuait, aux termes de l'article 44 du Code, de représenter les anciens employés non brevetés de Standard et que sa convention collective continuait de régir les conditions d'emploi de ces employés. En conséquence, à la date de la cessation de son emploi, M. Linke était toujours représenté par le SIDM et visé par sa convention collective. Il n'était donc ni assujéti à la convention collective de la Guild ni obligé de s'y joindre comme condition d'emploi continu chez ITB. Dans les circonstances, même si la décision de l'employeur de mettre fin à l'emploi de M. Linke n'était pas entachée de sentiment antisyndical et qu'elle était fondée sur une mauvaise interprétation des dispositions du Code, le geste qu'il a posé en mettant fin à l'emploi de M. Linke pour avoir refusé de se joindre à la Guild pendant que la convention collective du SIDM demeurait en vigueur constituait une violation de l'alinéa 94(1)a) du Code.

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With respect to the Guild, the Board found that section 95(g) has no application in the present circumstances. However, the Board determined that the union's action in demanding the dismissal of Linke for failure to join the Guild constituted a breach of section 96.

Although the union is entitled to rely on its union security clause, its right to enforce the same is subject to it being valid, in force and applicable to the employees at whom it is directed. Since the refusal to join the union and pay the appropriate dues can result in dismissal of the employee, the union has a duty to ensure that the security clause it seeks to enforce is applicable to the specific employee involved and, therefore, that its request to have the employee become a member of the union is justified under section 68 of the Code.

Here, Linke was not an employee of the Guild's unit at the relevant time and, accordingly, the Guild's conduct in requiring the employer to dismiss Linke amounted to a breach of section 96.

From a labour relations perspective, the Board determined that no award of damages would be appropriate in the present circumstances.

The Board has, however, directed the employer to offer Linke, contingent upon his joining the Guild, re-employment at his former seniority level.

En ce qui concerne la Guilde, le Conseil estime que l'alinéa 95g) ne s'applique pas dans les circonstances. Toutefois, le geste posé par le syndicat en demandant le renvoi de M. Linke pour avoir refusé de se joindre à la Guilde constituait une violation de l'article 96.

Bien qu'il soit loisible au syndicat de s'appuyer sur la clause de sécurité syndicale, son droit de l'exécuter exige qu'elle soit valide, en vigueur et applicable aux employés visés. Comme le refus de se joindre au syndicat et d'acquitter les cotisations prévues peut donner lieu au renvoi de l'employé, le syndicat est tenu de s'assurer que la clause de sécurité qu'il vise à exécuter est applicable à l'employé visé et, par conséquent, que sa demande que l'employé devienne membre du syndicat est justifiée aux termes de l'article 68 du Code.

En l'espèce, M. Linke n'était pas un employé membre de l'unité représentée par la Guilde à l'époque pertinente et, par conséquent, la conduite de la Guilde en exigeant que l'employeur renvoie M. Linke équivalait à une violation de l'article 96.

Du point de vue des relations de travail, le Conseil estime qu'il ne convient pas d'adjudger des dommages en l'espèce.

Toutefois, le Conseil a ordonné à l'employeur d'offrir à M. Linke, à condition que celui-ci devienne membre de la Guilde, la possibilité de réintégrer son niveau d'ancienneté antérieur.



## Reasons for decision

International Longshoremen's and  
Warehousemen's Union, Local 400,  
on behalf of Michael Linke,

*complainant,*

*and*

Island Tug & Barge Limited,  
Standard Towing Ltd.,  
and  
Canadian Merchant Service Guild,

*respondents.*

Board File: 745-5376  
CLRB/CCRT Decision no. 1198  
March 3, 1997

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Mr. Michael Eayrs and Ms. Roza Aronovitch, Members. A hearing was held on August 14-15, 1996, at Vancouver.

### Appearances:

Mr. Gerard F. Culhane, assisted by Mr. Al Engler, for the complainant union;  
Mr. Gary M. Catherwood, assisted by Mr. Robert Shields, for Island Tug & Barge Limited; and  
Mr. Denis T. LaCharité, assisted by Mr. Ken Herbert, for the respondent union.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

### **I**

On April 24, 1996, the International Longshoremen's and Warehousemen's Union, Local 400 ("ILWU"), filed unfair labour practice complaints alleging violations of

sections 94(1)(a) and 96 of the Code by Island Tug and Barge Limited ("ITB") and sections 95(g) and 96 by the Canadian Merchant Service Guild ("Guild").

The complaint revolves around the termination of employment, on March 6, 1996, of Mr. Michael Linke ("Linke") which resulted from circumstances surrounding a sale of business by Standard Towing Ltd. ("Standard") to ITB.

## II

On December 30, 1995, Standard and ITB consolidated their operations. At that time, the ILWU was certified to represent the **unlicensed** employees of Standard while the Guild was certified to represent Standard's **licensed** employees as well as all employees of ITB. Both collective agreements relating to Standard had September 30, 1997 as their expiration date.

In an earlier decision of July 29, 1996 (Board File nos. 585-599 and 585-600; CLRB LD #1574), the Board determined that the consolidation of operations which occurred on December 30, 1995, constituted a sale of business, pursuant to section 44 of the Code, and that there was a complete integration of Standard's employees with those of ITB. The Board further concluded, pursuant to section 45(1)(a), that a single bargaining unit was appropriate for collective bargaining and, considering the employee support, directed - pursuant to section 45(1)(b) - that:

*"... the intermingled employees at Island should be represented by the Guild under the terms of its current collective bargaining agreement."*

(page 4)

The Board's Order, pursuant to section 45, issued on July 31, 1996, and specifically provided that the Guild's collective agreement applied to all intermingled employees effective that date.



Although the sale of business, as envisaged by section 44 of the Code had taken place on December 30, 1995, at the time of the events relating to Linke's termination, the above Board Order had not yet been issued.

Following the consolidation of operations in December 1995, ITB carried out its business as a single employer. Based on its understanding of the Board's jurisprudence, and the overwhelming majority of support which the Guild commanded in the combined unit, the employer reached an agreement with the Guild which intermingled Standard and ITB's employees based on their current seniority within each respective unit, and proceeded with its operation with ITB as the employer and the Guild as the representative of a single integrated unit of employees. Linke was provided with one of the most senior positions in the intermingled unit.

Consequent thereon, the Guild wrote to ITB on January 29, 1996 and, in accordance with the union security clause contained in Article 1.4 (infra) of its collective agreement, demanded that five former employees of Standard become Guild members in order to maintain employment with ITB. Four of the employees did so; however, Linke did not.

On February 27, 1996, the Guild wrote a further letter to ITB specifically with respect to Linke. It advised therein that Linke had not yet become a member in good standing of the Guild and therefore: "*should not be scheduled for any work until his membership status with the Guild is looked after.*" Upon receipt of the Guild's request, the employer attempted to convince Linke to join the Guild to facilitate his continued employment. Linke refused. Accordingly, believing it was left with no alternative, the employer terminated Linke on March 6, 1996, for the reasons which it stated as follows:

*"Company merged with another one, union which Mike is a member of no longer is bargaining unit for employees Mike refuses to join other union, who have informed Mike must be terminated."*

Nonetheless, as a result of the employer's decision to merge its operations, Linke performed substantially more work, between December 1995 and the date of his termination, than that he would have done had the employer continued to operate under the two separate collective agreements.

On April 18, 1996, the ILWU filed a wrongful dismissal grievance on Linke's behalf alleging that ITB's demand that Linke join the Guild, as a condition of continuing employment, contravened the collective agreement in force between the ILWU and ITB.

On April 24, 1996, the ILWU filed the present complaint with the Board.

In a letter dated July 29, 1996, the Board informed the parties of its refusal to defer the complaint to arbitration pursuant to section 98(3).

### III

The relevant sections of the Code read as follows:

*"44.(1) In this section and sections 45 to 47.1,*

*'business' means any federal work, undertaking or business and any part thereof;*

*'sell', in relation to a business, includes the lease, transfer and other disposition of the business.*

*(2) Subject to subsections 45(1) to (3), where an employer sells his business,*

*(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;*

...

*(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and*

...

\* \* \* \* \*

*"45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,*

*(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;*

*(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and*

*(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.*

*(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union."*

\* \* \* \* \*

*"68. Nothing in this Part prohibits the parties to a collective agreement from including in the collective agreement a provision*

*(a) requiring, as a condition of employment, membership in a specified trade union; or*

*(b) granting a preference of employment to members of a specified trade union."*

\* \* \* \* \*

*"94. (1) No employer or person acting on behalf of an employer shall*

*(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;" ...*

\* \* \* \* \*

*"95. No trade union or person acting on behalf of a trade union shall*

*(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;"*

\* \* \* \* \*

*"96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."*

#### IV

#### **VIOLATION BY THE EMPLOYER OF SECTION 94(1)(a)**

The ILWU submits that at the time of Linke's dismissal on March 6, 1996, no Board declaration had been made pursuant to section 45 of the Code. Consequently, section 44(2)(c) continued to apply and the ITB was bound by the terms of the unexpired collective agreement between ILWU and Standard with respect to those employees covered by the same until the Board's Order dated July 31, 1996.

ITB's initial argument was that sections 44(1) to 44(3) only apply where a successor acquires a business and there is no intermingling of employees. It submits that where there is an intermingling of employees, sections 44(1) to 44(3) do not apply insofar as the Code stipulates that these provisions are "...subject to subsections 45(1) to (3)".

In our view, this argument misconstrues the purpose of section 44. The section is aimed at protecting bargaining rights in a continuous fashion when corporate changes are made to a business or a business is transferred; see Newfoundland Broadcasting Ltd. (1978), 26 di 576 (CLRB no. 120), page 584; and Intermountain Transport Ltd., (1984), 57 di 74 (CLRB no. 480). If ITB's submission were accepted, it would mean that in circumstances where the operations of two businesses are merged, there would



be no protection of bargaining rights during the transitory period between the date of the sale and the date of the Board's Order pursuant to section 45. That simply could not have been Parliament's intention. As the Board stated in Intermountain Transport Ltd., supra:

*"Especially when section 144(2)(c) [now section 44(2)(c)] is read in the context of the rest of section 144(2), it is clear that the collective agreement is meant to flow through without hiatus. It is not only after the sale that the collective agreement is binding on the successor, but also during the very process of the sale. Otherwise, the collective agreement could be completely undermined and the protection afforded by section 144(2)(c) rendered illusory..."*

(pages 90-91)

Accordingly, section 44(2) of the Code continues to apply until the Board consolidates the bargaining units and determines the appropriate bargaining agent pursuant to section 45.

On the merits, ITB points out that when it purchased Standard it immediately acknowledged its obligation as a successor employer and effected the orderly merger of its operations as well as the complete intermingling of its employees. It recognized that access to section 45, and the resultant sale of business declaration by the Board, is restricted to applications made by an affected trade union. However, at the relevant time, neither union would make the appropriate application. Faced with the merger of its operations, a complete intermingling of all employees, the apparent overwhelming support which the Guild enjoyed within the intermingled "unit", and its inability to apply for a declaration under section 45, ITB proceeded on the basis that the Guild's collective agreement would apply. ITB argues that, in the circumstances, it was reasonable for it to conclude that it would be necessary for Linke to join the Guild as a condition of his continuing employment.

Section 44 is a public policy provision. Unlike section 45 which requires an application by a trade union affected, section 44 applies automatically and immediately as of the date of the transfer or sale of all or part of a business, and is not dependent on a Board declaration, see: U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Halifax Grain Elevator Limited (1991), 85 di 42 (CLRB no. 867); Intermountain Transport Ltd., *supra*. This interpretation is understandable given that the protection of bargaining rights by successorship provisions must be continuous in order to be effective.

In the present case, no declaration had been issued by the Board, pursuant to section 45, prior to Linke's termination. The Board's decision (LD #1574) recognized that a sale of business occurred on December 30, 1995, and its Order, pursuant to section 45, consolidated the existing bargaining units into one; determined that the Guild was the bargaining agent for such unit; and directed that the Guild's collective agreement applied to all employees, including former Standard employees, effective July 31, 1996, the date of its issue (see section 3(2) of the Board's Regulations). As a consequence, until that Board Order issued, the ILWU, pursuant to sections 44(2)(a) and (c) of the Code, continued to represent Standard's unlicensed employees and its collective agreement continued to govern the terms and conditions of employment of those employees.

Accordingly, on March 6, 1996, the date of his termination, Linke was still represented by the ILWU and covered by the ILWU's collective agreement. He was therefore neither bound by the Guild's collective agreement, nor obliged to join it as a condition for continuing employment with ITB.

We have no hesitation in concluding that the employer's decision to terminate Linke was based on the honestly held belief that the Guild's collective agreement applied to all its employees (including the unlicensed Standard employees) as of the date of the sale. The issue that remains is whether ITB's decision to terminate Linke's employment, based on a misinterpretation of sections 44 and 45, and an erroneous

presumption of the retroactive nature of an eventual Board Order, is in violation of section 94(1)(a) of the Code.

Anti-union animus is not a necessary ingredient for a violation of section 94(1)(a) of the Code: see Canadian Broadcasting Corporation (1990), 83 di 102 (CLRB no. 839); Canadian Broadcasting Corporation (Ciné Le Matou Inc.) (1987), 71 di 12 (CLRB no. 646); Maritime Employers' Association (1985), 63 di 69 (CLRB no. 540); and Bernshine Mobile Maintenance Ltd. (1984), 56 di 83 (CLRB no. 465).

In CFTO-TV Limited (1995), 97 di 35 (CLRB no. 1111), the Board extensively described the two-fold purpose of section 94(1)(a):

*"Parliament has used broad language in prohibiting employers or persons acting on their behalf from participating in, or interfering with, the formation or administration of a trade union or the representation of employees by a trade union. The purpose of section 94(1)(a), sometimes referred to by the Board as an "omnibus provision", is twofold. First, section 94(1)(a) is designed to provide employees with broad protection from an employer's interference with their rights and freedoms recognized by section 8 of the Code. In Canada Post Corporation (544), supra, the Board stated the following:*

*'This prohibition of section 184(1)(a) [section 94(1)(a)] is designed to give meaning to the basic freedoms spelled out in section 110(1) of the Code [now section 8]... which reads as follows:*

*110. (1) Every employee is free to join the trade union of his choice and to participate in its lawful activities.*

*Precedent has established that the scope of section 184(1)(a) is broad enough to encompass all the rights embodied in section 110(1) that are not specifically protected by section 184(3) of the Code. In short, section 184(1)(a) is an omnibus provision, a shield that protects against employer interference with all the basic rights that the Code confers on employees.'*

*This provision is also aimed at protecting the union which ought to be free from improper interference by the employer in determining the manner in which it will administer itself and represent the employees of the employer. For example, in Canada Post Corporation (772), supra, the Board had this to say.*

*'... s. 94(1)(a) is directed at the protection of the entity rather than individual basic freedoms under section 8(1). These provisions do not contemplate that union administration or that the representation of employees by a trade union will be restricted to employees under the Code. The reality of the trade union movement is that a great number of union representatives are employees of the trade union rather than employees in bargaining units employed by employers under the Code. In this case we view Messrs. Metcalfe and Vandonk as elected union representatives of the trade union as an entity which is protected by section 94(1)(a) of the Code rather than employees who are exercising their rights and basic freedoms under section 8(1) to participate in the lawful activities of the trade union of their choice. It is not necessary to be employees to receive the protection offered trade-union representation by section 94(1)(a). ...*

*(pages 127-128; and 250; emphasis added)''*

*(pages 59-60)*

Where the employers actions are not tainted by anti-union animus, the Board applies a balanced test to determining whether an employer's decision interferes with the formation or administration of a union or its representation of employees, (see Canadian Broadcasting Corporation, supra, at page 129; and Bernshine Mobile Maintenance Ltd., supra, at page 91). The test consists of an evaluation of whether the adverse effect on a union's protected rights are counter-balanced by "compelling and justifiable business reasons".

In the present case, it cannot be seriously challenged that the employer's decision to terminate Linke's employment affected the ILWU's rights protected under the Code.



Equally, by insisting that he join the Guild, the employer affected Linke's right to be represented by his own bargaining agent.

Was the employer's action justified by a compelling business reason? The common definition of "compelling and justifiable business reasons" is found in Canada Post Corporation (1987), 69 di 91 (CLRB no. 620):

*"For an employer to establish compelling and justifiable business reasons, it must show that its operations are being disrupted or that other legitimate business interests are being adversely affected..."*

(page 99)

In discussing this requirement in Maritime Employers' Association (1985), 63 di 69 (CLRB no. 540) the Board stated that the test:

*"... requires a close causal relationship between the employer's reason and action. In other words, to be considered legitimate, the measures to which the employer resorts must be strictly warranted by the facts that brought them on. Anything less might in fact induce an employer to take advantage of a situation and act well beyond what is really called for and thus flout the rights of the union and the employees."*

(pages 91-92)

In our view, the business reasons invoked by ITB to justify the termination of Linke do not conform with the accepted interpretation adopted by the Board. There was no evidence to suggest that the employer's operations were or would be disrupted, or its business interests affected, by the application of the ILWU collective agreement to the unlicensed Standard employees or by Linke's refusal to join the Guild. In essence, ITB terminated Linke's employment because it chose to apply the Guild's collective agreement. In doing so, whether intentional or not, it refused both to recognize the

ILWU as the bargaining agent of unlicensed Standard employees or to comply with the ILWU's collective agreement in force at the time.

The Board has repeatedly recognized that employers must abide by the rule of strict neutrality and refrain from interfering with the choice of a bargaining agent: see Ganeca Transport Inc. (1990), 79 di 199 (CLRB no. 780); Canadian Imperial Bank of Commerce (North Hills and Victoria Hills Branches) (1979), 34 di 651 (CLRB no. 173); General Aviation Services Limited (1979), 34 di 791 (CLRB no. 182); Télévision Saint-François Inc. (1981), 43 di 175 (CLRB no. 306); and La Sarre Air Services Limited (Propair Inc.) (1982), 49 di 52 (CLRB no. 377). Corollarily, an employer may not choose which collective agreement will apply to its employees:

*"The negotiation of collective agreement is at the core of a union's representation of employees. For an employer to ignore a collective agreement, by-pass the union, and make individual contracts with employees is direct interference with a union's representation rights... This is so even if the employees are subsequently covered under another collective agreement with the same union. An employer cannot pick and choose whatever collective agreement it likes. Manipulation aimed at avoiding collective agreements altogether would obviously be a more serious violation, but we conclude there can be a violation when there is a shift from one collective agreement to another. If an employer finds a collective agreement no longer economically viable, it is to the union that the employer must look for relief."*

(Intermountain Transport Ltd., supra, page 94; emphasis added)

In the circumstances, the employer's decision to choose one union and its collective agreement over another in the context of a sale of business - without a Board determination pursuant to section 45 - is tantamount to a decision to favour one trade union over another in the context of a raid or competing applications for certification. The same principle of strict neutrality which applies in the context of certification matters also applies in the context of representation issues to be resolved under section 45 of the Code. Here, the net result of failing to observe this rule was the termination of an employee.

In the present case, as we have already stated, we do not suggest that the employer intended any adverse consequences of its actions, nor do we suggest any anti-union motives directed at the ILWU. However, whether ITB misinterpreted the provisions of the Code or wrongly presumed an eventual Board Order, its decision to choose one collective agreement over another had the same consequences and contravened the rule of strict neutrality that an employer must observe under the Code. Notwithstanding the mitigating facts of the present case, the principle to be protected and applied is too important to permit dilution. In the absence of circumstances which meet the balancing test set forth above, the employer simply cannot be seen to be taking a role in the choice of union representation of its employees.

In choosing to apply the Guild's collective agreement, ITB ignored both the ILWU's statutory right, under section 44(2)(a), to represent the unlicensed Standard employees, as well as its obligation to apply the ILWU collective agreement pursuant to section 44(2)(c). Consequently ITB's choice to apply the Guild's collective agreement and terminate Linke's employment interfered with the ILWU's bargaining rights - protected by the Code's successorship provisions - contrary to section 94(1)(a) of the Code.

Given the fact that we have found the employer to be in breach of section 94(1)(a) of the Code, there is no need to address the violation of section 96.

## V

### **VIOLATION, BY THE UNION, OF SECTION 95(g) AND 96 OF THE CODE**

In its application the ILWU alleges a breach, by the Guild, of sections 95(g) and 96 of the Code.

In its response, the Guild states generally that, in requesting the employer to terminate Linke's employment based on his refusal to join the union, it did not violate any

provisions of the Code. It maintains that in the circumstances, it was entitled to have its union security clause enforced and to require Linke to become a member pursuant to Article 1.4 of its collective agreement. It argues that, on the merits, it cannot be said to have intimidated or coerced when it only enforced the union security clause contained in its collective agreement, which the Code specifically permits.

Section 68(a) of the Code specifically permits the inclusion of union security provisions in collective bargaining agreements which require membership in a trade union as a condition of employment.

The Guild and ITB have included such a clause in their collective agreement:

*"1.4 The Company recognizes the Guild as a source of supply for all Officers covered by this Agreement and may request same from the Office of the Guild as required. The Company will only employ members of the Guild in good standing. All new Employees are required to sign a letter regarding Guild membership status as set out in Appendix ' ' of the Agreement."*

(emphasis added)

It has long been established that trade unions have the right to enforce union security provisions contained in their collective agreements. In Vancouver General Hospital, [1978] 2 Can LRBR 508 (B.C.) the B.C. Board, in the context of the duty of fair representation, stated the following in that respect:

*"It is worth dwelling for a moment on this general issue of the union security clause. The Board held in its recent - and controversial - decision in B.C. Hydro and OTEU and Tottle, [1978] 2 Canadian LRBR 1 that the enforcement of union security clauses is permitted under the Labour Code. It is not, ipso facto, a violation of the duty of fair representation for a union to go so far as to secure the dismissal of an employee who has contravened legitimate union policies for the benefit of the entire union. Our Labour Code recognizes the fact that the individual's right to continue work on his own terms must be*



*accommodated to the general right of the unit of employees to bargain effectively with their employer. But it is one thing to say that the use of Union security clauses to enforce union discipline is not prohibited by the Labour Code. It is quite another to imply that the abuse of this kind of union power is not regulated by the Code..."*

(page 513; see also David Howard, BCLRB No. 358/85; Bruce Beattie, BCLRB No. 133/87)

Because they are specifically permitted by the Code, neither the existence nor enforcement of such a clause, by itself, constitutes coercion or intimidation within the meaning of the provisions of section 96 of the Code; (see: Nancy Bourdon et al., BCIRC No. C205/91, Nov.1, 1991), page 59).

However, the union's right to enforce such a clause is not unfettered. In circumstances where a loss of employment can result, it is restricted. The union's right to request the dismissal of an employee is restricted by Section 95(e) to cases where the employee has failed to pay periodic dues, assessments and initiation fees. In Fred J. Solly (1981), 43 di 29 (CLRB no. 296), the Board stated that:

*"Legislators have recognized for many years that the permission of union security clauses in collective agreements and their enforcement ought to be balanced by restrictions on the loss of employment as the result of loss of union membership... The federal legislation was once selective and addressed only the question of dual unionism (see Industrial Relations Disputes and Investigation Act, R.S.C. 1952, c. 152, s. 6(2)). Today union security provisions are permitted in collective agreements (section 161), but loss of union membership for any reason other than failure to pay period dues assessments, and initiation fees to the union may not result in loss of employment (sections 185(e) and 184(3)(a)(ii))."*

(page 40; see also Gerald Abbott (1977), 26 di 543 (CLRB no. 114), page 552))

The right to enforce a union security clause contained in a collective agreement is subject to it being valid, in force and applicable to the employees at whom it is

directed. Since a refusal to join the union and pay the appropriate dues can result in dismissal of the employee, the union has a duty to ensure that the security clause it seeks to enforce is applicable to the specific employee involved and, therefore, that its request to have the employee become a member of the union is justified under section 68 of the Code.

Only the certified or voluntary recognized bargaining agent of the employees concerned has the right to enforce its security clause contained in the collective agreement. This principle was applied in Bradette et al., [1979] 3 Can LRBR 445 (Ont.) in the context of a violation of section 61 of the *Ontario Labour Relations Act*, (a provision similar to section 96 of the Code). There, the employer, engaged in the production of motion pictures, had hired employees prior to the commencement of filming. On arrival at the set, the star of the picture refused to work with persons other than members of the trade union. The employer and the trade union thereupon informed those employees already hired that they would have to join the union in order to continue to work. The complainant employees brought a complaint against the employer and the union alleging intimidation and coercion in compelling them to become members.

The Ontario Board found that both the employer and the union had violated the Act by threatening the employees with dismissal if they did not join the union. It held that union security clauses may be enforced only where the trade union has the requisite employee support for certification:

*"Section 38 [similar to s. 68(a)] is generally regarded as a 'permissive provision.' It provides that under certain conditions an employer and a trade union can enter into a collective agreement requiring union membership as a condition of employment notwithstanding the fact that otherwise such a requirement would be in violation of other provisions of the Act. It should be noted that in the type of situation before us, section 38 applies only to collective agreements signed either at a time when more than 55 per cent of the employees were members of the union or after the union had satisfied the Board that it had the requisite employee support for certification. Clearly these conditions are meant*

*to ensure that before union membership can become a valid condition of employment, the union involved must already enjoy the support of a clear majority of the employees.*

*At the time the grievors were told that they would have to join IATSE to work on the movie, the pre-conditions for the application of section 38 did not exist. IATSE had not been certified by the Board. ... In addition, there was not at the time any collective agreement between IATSE and Purple Heart. In these circumstances the demands put on the grievors did not come within the permissive provisions of section 38. We see little merit in the argument that at another point in time and under other conditions the respondents' actions might have been lawful. The respondents acted when they did and under circumstances which make their actions unlawful."*

(Bradette et al. [1979] 3 Can LRBR 445 at page 452; emphasis added)

In the present case, the Guild's collective agreement was not applicable to Standard's unlicensed employees nor was the Guild Linke's exclusive bargaining agent at the time of his dismissal. Rather, by virtue of sections 44(2)(a) and 44(2)(c), the ILWU continued to represent Standard's unlicensed employees and its collective agreement continued to govern the terms and conditions of their employment until the Board's Order of July 31, 1996.

Section 68(a) of the Code only permits mandatory membership, as a condition of employment, in the certified or voluntarily recognized bargaining agent. Accordingly, because the Guild's collective agreement did not apply to Linke at the material time, the Guild had no right to enforce its security clause on him or to require his dismissal.

The issue left to be addressed is whether the union's conduct, in demanding and procuring Linke's dismissal, is proscribed by either section 95(g) or 96 the Code.

### **SECTION 95(g)**

The Guild asserts that none of the provisions of section 95 pertain to the present case. It contends that section 95(g), specifically alleged by the complainant, is not applicable

in that Linke had never been a Guild member and therefore was not subject to discipline by the Guild.

Section 95(g) deals with discriminatory disciplinary action taken against an employee:

*"95. No trade union or person acting on behalf of a trade union shall*

*...*

*(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;"*

Although it is true that section 95(g) applies to all employees - and not only to union members - the action taken by the Guild in requesting Linke's termination simply does not correspond with the definition of "disciplinary action" or "penalty" envisaged by section 95(g). Linke was not expelled or suspended from Guild membership. Rather, he chose not to join the Guild. The Guild's action in requesting his termination, was not, *per se*, disciplinary. Had the employer chosen not to terminate Linke, the Guild's request, in itself, would have imposed no disadvantage or loss to him.

Section 95(g) does not apply in the present case.

## **SECTION 96**

If the Guild's conduct is to be found in breach of the Code, that breach must lie within section 96.

In that regard, the Guild submits that the term "person" used in section 96 of the Code, does not apply to it. It refers to the definitions of "employee", "employer" and "trade union" in section 3 of the Code and argues that the term "person" was not intended to include a trade union. Therefore, it submits that the Guild cannot be guilty of an unfair labour practice under section 96.



To date, the Board has not decided whether the word "person", as that term is used in section 96, includes a trade union. In both Paul Horsley et al. (1991), 84 di 201 (CLRB no. 861) and Eastern Provincial Airways Limited (1983), 54 di 172 (CLRB no. 448), the issue was raised but not decided.

The provisions of Section 96, in both official languages, are repeated below:

*"96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.*

*Il est interdit à quiconque de chercher, par des menaces ou des mesures coercitives, à obliger une personne à adhérer ou à s'abstenir ou cesser d'adhérer à un syndicat."*

(Emphasis added)

It should be noted that the French version of s. 96 translates the English word "person" in the first line, in reference to the perpetrator, with the word "quiconque" which means "whosoever" or "anyone who". However, the English word "person" is not always translated with "quiconque". On other occasions, the French version of the Code uses the word "personne" to translate the word "person". The distinction is evident from the section itself as it relates to the second use of the term "person", in reference to the employee alleged to be intimidated or coerced. In this instance the French version translates the word person by "personne".

The distinction is also notable in the definition provisions of section 3. There the French version of "employee" translates the word "person" with "personne"; whereas the French version of employer translates the word "person" with the term "quiconque". The difference is not insignificant and is important for a proper interpretation of the phrases as they appear in section 96 of the Code.

The need for the all encompassing meaning of the term "person" is critical to the broad and effective application that section 96 intends and requires. Section 96 is a general prohibition against intimidation or coercion. As such, it is intended to apply generally to anyone and anything that might intimidate or coerce an individual in relation to the exercise of a right related to trade union membership. To be effective in this context, and to comport with the general scheme of the Code, the term "person" must include any party who might exercise such intimidation or coercion; within the scheme of the Code that must include an employer, an employee or a union.

This we suggest is evident from the Code itself. For example, section 103 of the Code deals with the prosecution of employer organizations, trade unions and councils of trade unions. It states:

*"103.(1) A prosecution for an offence under this Part may be brought against and in the name of an employers' organization, a trade union or a council of trade unions.*

*(2) For the purpose of a prosecution under subsection (1),*

*(a) an employers' organization, trade union or council of trade unions shall be deemed to be a person..."*

It would be surprising if the legislators had gone out of their way to ensure that a union is clothed with the broad character of a "person" for purposes before the criminal courts yet did not intend the same status for matters, such as section 96, which fall wholly within our Code.

This is perhaps most compellingly confirmed by section 101 of the Code which provides:

*"101.(1) Subject to section 100, every person other than an employer or a trade union who contravenes or fails to comply with any provision of this Part other than section 50, 94 or 95 is guilty of an offence and*

*liable on summary conviction to a fine not exceeding one thousand dollars.*

*(2) Subject to section 100, every employer or trade union who or that contravenes or fails to comply with any provision of this Part other than section 50, 94 or 95 is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars."*

In our view it is apparent, from section 101, that the Code intended that "every person" - in French "quiconque" - must include a trade union. Otherwise, there would have been no need to specifically exclude a trade union from the meaning of the term person within section 101(1).

A review of section 101(2) equally demonstrates that section 96 was to encompass trade unions. The section states that a trade union can be liable for conviction for the contravention of **any** provision of Part I of the Code excepting sections 50, 94 or 95. By definition therefore, a union must be vulnerable to be found guilty of a breach of section 96. If a trade union can be found guilty, pursuant to section 101, of a summary conviction offense for having violated section 96, it necessarily follows that it is open to the Board to find it in breach of the section in the first place.

The broad interpretation of the word "person" which we ascribe here to the term within section 96, is shared by others. In Canada Labour Relations Board: Federal Law and Practice (Toronto: The Carswell Company Limited, 1983), James E. Dorsey states the following at page 224:

*"Section 186 [96] is a general prohibition against every person from seeking, through intimidation or coercion, to compel anyone to become or refrain from becoming a union member. Apart from any constitutional limitation on its operation, it is directed to all employers, unions and individuals."*

Similarly, in Canada Labour Relations Board: Policies and Procedures (Toronto: Butterworths, 1986) the authors Foisy, Lavery and Martineau state at page 265:

*"Section 186 [96] provides that 'no person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union'. The prohibitions of that section are not limited to actions by employers and encompass those of unions and employees as well."*

For all the above reasons we find that the Guild is a person within the meaning of section 96 of the Code and, in the circumstances of this case is guilty of a violation of the same.

## VI

### REMEDY

Having found both ITB and the Guild guilty of a violation of the Code, we are left with a question of what remedy is appropriate in the circumstances.

When the sale of business occurred in December 1995, the employer and the Guild immediately ensured that all of the employees of ITB and Standard were intermingled based on the actual seniority which the employees enjoyed within their individual units. As a result, Linke was provided with one of the most senior positions in the intermingled unit. As a result, his workload increased and exceeded what he would have done had the employer kept the Guild and ILWU units separate until the date of the Board's final order.

The evidence at the hearing was that the practice of belonging to both the Guild and the ILWU is common place in the industry. This makes sense insofar as employees who have joint union membership are in a position to find suitable work with either union when the occasion and opportunity arise. Linke is a senior employee with many years of knowledge and experience in the industry. It is equally clear that Linke is a sophisticated trade unionist, having been active in the ILWU, and was knowledgeable about its operation. His knowledge of the industry, and the practical operation of a trade union, put him in a position to be acutely aware of the unlikelihood that the ILWU would eventually represent the employees for ITB.



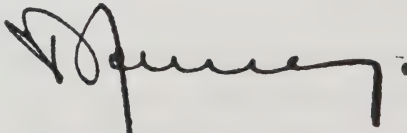
Although he was not prepared to join the Guild, it appears he was nevertheless prepared to accept work - until the date of his termination - based on an enhanced intermingled seniority position with the Guild that entailed a substantially increased work load than that which he would have received as a member of the ILWU unit. Finally, although up until the time of his termination - and indeed, even to the date of the hearing - he was offered a position with the employer consequent upon his joining the Guild, he continued his refusal to do so. Instead, he preferred to put himself in a position to pursue damages through an order of this Board.

Although, as indicated earlier, the preservation of the principle involved remains important, the Board nevertheless could find no adverse motives on the part of the employer in responding to the Guild's demand to dismiss Linke for his refusal to join the Guild. Equally, the evidence did not disclose that the Guild harboured or directed any particular adverse motives against Linke. It demanded, and received, appropriate union membership applications from the other ILWU employees who decided to remain at work with ITB. Linke singularly refused to join the Guild and preferred instead to be dismissed.

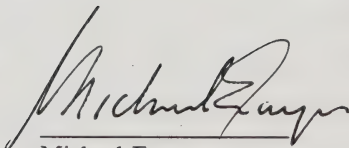
The increased work which Linke performed from the time of the sale to the date of his termination, and the increased employment he anticipated from the date of his dismissal to the date of the Board's order, was predicated upon an intermingled single employee unit for ITB for which the Guild would be the employee representative and in which Linke would have enjoyed an enhanced "intermingled" seniority position. It was apparent to the Board that had the employer kept the two units separate and apart until the Board's order under section 45, there would have been little work for Linke within the unit for which ILWU held representative rights. In essence Linke's damages from the date of his termination (March 6, 1996) to the date of the Board's order (July 31, 1996) would be severely limited at best and, relatively speaking, are from our perspective negligible.

Little can be gained in our forcing the parties to now go through the process of determining what hours might have been payable to Linke had the intermingling not taken place and had the employer maintained two separate units and operated them individually until such time as the Board granted its Order. It makes even less sense, from a labour relations perspective, to leave open the prospect of reconvening the hearing in order to determine the specific amount payable to Linke.

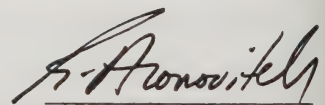
Accordingly, considering the fact that the carrying of two cards is common place in the industry; that any increased output for the members of the ILWU unit were directly related to the intermingling of those employees with the Guild's and the granting of preferred seniority; and, finally, the fact that, although they acted erroneously, there can be no adverse motivations attributed to either ITB or the Guild, we are therefore convinced that no remedy, in the form of damages, is appropriate in the present circumstances. However, in the unique circumstances of this case, we nevertheless direct that the employer, upon Linke's joining the Guild - consequent upon the Board's Order of July 31, 1996 and the Guild's union security clause applicable to him since that date - again offer a position to him at the seniority level which he held at the time of his termination. Should Linke refuse to accept a position within one week of the employer's offer, there shall be no further obligations on the employer with respect to the same.



Richard I. Hornung, Q.C.  
Vice-Chair



Michael Eayrs  
Member



Roza Aronovitch  
Member

CAI  
L100  
-ISSD

# Information

*This is not an official document. Only the Reasons for decision can be used for legal purposes.*

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## Summary

Marc Lepage, *employee*, Ottawa-Carleton Regional Transit Commission, *employer*, and Michael Wiwchar, *Safety Officer*.

Board File: 950-351  
CLRB/CCRT Decision no. 1199  
February 28, 1997

Referral of a safety officer's decision pursuant to section 129(5) of the Canada Labour Code, Part II.

An operator refused to continue driving his bus because of neck and back pain caused by the height of the driver's seat. The safety officer concluded that there was no danger within the meaning of the Code, but believed that the six-inch "riser" (supporting the seat system and pedestal) could create a hazard to an operator. He recommended the matter be considered by the occupational safety and health committee.

The Board confirmed the safety officer's decision, and made note of the employer's seat replacement program, which included improved seat comfort and a change from six-inch to four-inch risers.

## Résumé

Marc Lepage, *employé*, Commission de transport régionale d'Ottawa-Carleton, *employeur*, et Michael Wiwchar, *agent de sécurité*.

Dossier du Conseil: 950-351  
CLRB/CCRT Décision n° 1199  
le 28 février 1997

Renvoi de la décision d'un agent de sécurité en vertu du paragraphe 129(5) du Code canadien du travail, Partie II.

Un chauffeur a refusé de continuer de conduire son autobus en raison de maux de cou et de dos causés par la hauteur de son siège. L'agent de sécurité a conclu à l'absence de danger au sens du Code, mais il croyait que l'«élévateur» de six pouces (qui soutenait le siège et le socle) pouvait lui nuire. Il a recommandé que le comité de sécurité et de santé au travail examine cette question.

Le Conseil a confirmé la décision de l'agent de sécurité et a pris note du programme de remplacement des sièges de l'employeur, qui comprenait l'installation de sièges plus confortables et d'élévateurs de quatre pouces à la place de ceux de six pouces.



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## Reasons for decision

Marc Lepage,

*employee,*

*and*

Ottawa-Carleton Regional Transit Commission,

*employer,*

*and*

Michael Wiwchar,

*safety officer.*

Board File: 950-351

CLRB/CCRT Decision no. 1199

February 28, 1997

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The Board was composed of Ms. Sarah E. FitzGerald, sitting as a single Member pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health). A hearing was held on November 18, 1996 in Ottawa.

### Appearances

Mr. Marc Lepage, employee, assisted by Mr. Robert Simpson, Secretary-Treasurer, Amalgamated Transit Union; and

Mr. Ron Mooney and Mr. Wayne McKinnon, accompanied by Mr. Roger Mills, counsel, for OC Transpo; and

Mr. Michael Wiwchar, Labour Affairs Office, Human Resources Development Canada.

## Background

Mr. Marc Lepage requested in a timely manner that a decision of Mr. Michael Wiwchar, Labour Affairs Officer, be referred to the Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health):

*"129. (5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."*

Safety officer Wiwchar investigated Mr. Lepage's September 30, 1996 refusal to continue operating Bus 8550. Mr. Wiwchar concluded that there was no danger within the meaning of Part II of the Code, and Mr. Lepage requested that the decision be referred to the Board.

*"122. (1) ... 'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."*

It is the Board's mandate to inquire into the circumstances of a decision referred to it, and the reasons therefor. See section 130(1) of the Code.

## Facts

Based on the evidence presented at the hearing, the circumstances of the work refusal and safety officer's decision can be summarized as follows.

Mr. Lepage has been an OC Transpo operator for more than nine years. On September 30, 1996, he commenced his shift at 12:30 p.m., operating Bus 8550. He describes feeling an immediate neck pain which worked its way down his back.

The air ride seat had been adjusted to the lower end of the adjustment range. Despite this, Mr. Lepage says that his legs barely touched the floor of the bus, and his arms were angled more steeply down toward the steering wheel than they should have been. He found it necessary to lean forward to grip the steering wheel properly, and to see out from under the sun visor, which in turn caused him pain.

Mr. Lepage had experienced prior injuries to his neck, shoulder and back as an OC Transpo operator, although not for reasons related to seating position. On September 30, 1996, wishing to avoid the possibility of injury, he considered it unwise to continue operating Bus 8550.

At 5 feet, 9 inches in height, he does not appear to be of unusual build. He did not suggest that his size, when compared to other OC Transpo operators, warranted any special consideration.

Mr. Lepage contacted OC Transpo Control, and a mechanic was dispatched to meet him and examine the seat. Bus 8550 was equipped with an American Ride seat system. The mechanic found no defect. Mr. Lepage was unwilling to continue operating the bus and invoked the right to refuse to perform work posing a "danger" (as that term is defined above). The seat was further examined and measurements taken in the presence of Mr. Lepage and employer safety representatives. OC Transpo was unwilling to replace the bus as no defect in the seat system had been discovered and there had been no complaints of this type concerning Bus 8550 since it was put into service in 1985. The matter remained unresolved, and a safety officer was requested from Human Resources Development Canada.

Safety officer Wiwchar arrived at 4:30 p.m. and conducted an investigation. He accepted the employer's statement that the seat met design and manufacturing specifications. As Mr. Lepage was not experiencing any pain at the time of the investigation, Mr. Wiwchar concluded that there was no danger within the meaning of the Code. As Mr. Lepage's shift was nearing completion, Mr. Lepage returned his bus to the depot and he has not driven Bus 8550 since. At the hearing, Mr. Lepage agreed that although he did not consider operating Bus 8550 to be immediately dangerous to him, he certainly had experienced discomfort.

All parties agreed, at the time of safety officer Wiwchar's investigation, that when the air ride seat was adjusted to its lowest position, there could still be a two-inch (2") difference in the operator's seating height between buses. The difference was accounted for by the height of the "riser" which, simply described, is a large block attached to the floor of the bus, to which the seat system and its pedestal are affixed. American Ride seat systems usually are installed on OC Transpo buses with either four-inch (4") or six-inch (6") risers, although in the case of Bus 8550, a five-inch (5") riser was used from time to time.

The employer accepts that Bus 8550 was equipped with a six-inch (6") riser on the day of Mr. Lepage's work refusal. Although concluding there was no "danger" to Mr. Lepage, safety officer Wiwchar believed a difference in riser height could cause discomfort that could create a hazard for operators. He recommended to the employer that the issue be referred to the occupational safety and health committee.

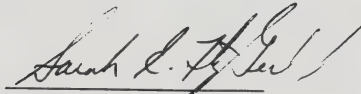
### Conclusion

After inquiring into the decision of safety officer Wiwchar, the Board finds no basis to conclude that he erred and confirms the decision.

Finally, the Board takes note of OC Transpo's program to replace the American Ride seats on its buses with a more comfortable Recaro seat. Of an estimated 150 buses



equipped with the American Ride seat and a six-inch (6") riser, OC Transpo advises that following the recommendation of its Technical Advisory Committee, it will install only four-inch (4") risers with the new Recaro seat. It was of interest to Mr. Lepage to learn that the replacement program had been scheduled for completion, funds permitting, in December 1996.

A handwritten signature in dark ink, appearing to read "Sarah E. FitzGerald", written over a horizontal line.

Sarah E. FitzGerald  
Member



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## Summary

Communications, Energy and Paperworkers Union of Canada, *applicant*, and The Shopping Channel, Division of Rogers Broadcasting Limited, *employer*.

Board File: 555-4091  
CLRB/CCRT Decision no. 1200  
March 13, 1997

This is a certification application in which the Board determined that the employer, the Shopping Channel (TSC), is a federal undertaking pursuant to section 4 of the Canada Labour Code.

TSC is the successor of CHSN which had an application before the CRTC for a broadcasting licence which was denied. Subsequently, in January 1995, CRTC granted an exemption order with respect to tele-shopping programming service undertakings.

The union submitted that TSC is a federal undertaking since it is an integral part of the operations of cable distributors, which are undeniably federal undertakings.

The employer submitted that TSC is not a broadcaster, but merely produces programming and purchases air time. It operates independently from the core federal undertaking.

## Résumé

Syndicat canadien des communications, de l'énergie et du papier, *requérant*, et The Shopping Channel, division de Rogers Broadcasting Limited, *employeur*.

Dossier du Conseil: 555-4091  
CLRB/CCRT Décision n° 1200  
le 13 mars 1997

Il s'agit en l'espèce d'une demande d'accréditation par laquelle le Conseil a déterminé que l'employeur, The Shopping Channel (TSC), est une entreprise fédérale aux termes de l'article 4 du Code canadien du travail.

TSC est le successeur de CHSN qui avait présenté une requête au CRTC en vue d'obtenir une licence de radiodiffusion, laquelle requête a été rejetée. Par la suite, en janvier 1995, le CRTC a rendu une ordonnance d'exemption relativement aux entreprises de service de programmation de téléachat.

Le syndicat soutient que TSC est une entreprise fédérale, parce qu'elle fait partie intégrante des entreprises de câblodistributeurs qui sont indéniablement des entreprises fédérales.

L'employeur soutient que TSC n'est pas un radiodiffuseur et que ses activités se limitent à programmer et à acheter du temps d'antenne. TSC fonctionne indépendamment de l'entreprise fédérale principale.



The Board determined that TSC's normal activities amount to broadcasting and is clearly a programming undertaking for the purpose of the Broadcasting Act and therefore constitutes a federal undertaking pursuant to section 92(10)(a) of the Constitution Act, 1867 and pursuant to section 4 of the Code.

Le Conseil estime que les activités ordinaires de TSC équivalent à de la radiodiffusion et en font clairement une entreprise de programmation au sens de la Loi sur la radiodiffusion; par conséquent, TSC constitue une entreprise fédérale aux termes de l'alinéa 92(10)a) de la Loi constitutionnelle (1867) et aux termes de l'article 4 du Code.

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## Reasons for decision

Communications, Energy and Paperworkers  
Union of Canada,

*applicant,*

*and*

The Shopping Channel, Division of Rogers  
Broadcasting Limited,

*employer.*

Board File: 555-4091  
CLRB/CCRT Decision no. 1200  
March 13, 1997

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The Board was composed of Mr. Jean L. Guilbeault, Q.C., Vice-Chair, and Messrs. Michael Eayrs and Patrick H. Shafer, Members. A hearing was held on January 10, 1997, at Toronto.

### Appearances

Mr. J. James Nyman, Counsel, assisted by Mr. Dave Correia, employee of The Shopping Channel, and Mr. Vic Morden, National Representative, CEP, for the applicant; and

Mr. Howard A. Levitt, assisted by Mr. Rael Merson, General Manager, The Shopping Channel, and Mr. Jerry Appleton, Vice-president, Broadcast Operations, for the employer.

These reasons for decision were written by Mr. Jean L. Guilbeault, Q.C., Vice-Chair.

This certification application was filed by the Communications, Energy and Paperworkers Union of Canada (CEP) pursuant to section 24 of the Canada Labour Code. The Board issued an interim decision on February 20, 1997, with reasons to follow by which it determined that the employer was a federal undertaking pursuant to section 4 of the Code. These are the reasons.

## The Facts

The employer in this case, The Shopping Channel ("TSC"), is an enterprise engaged essentially in retail sales. In order to display its goods, however, TSC relies heavily on the broadcast of images of those goods on television screens across Canada. Viewers who wish to purchase a particular item generally do so by telephone. Such goods are then mailed to the purchaser by TSC's warehouse personnel.

The union had applied for a unit comprised only of those employees who are engaged in the employer's broadcast operations, and the Board subsequently certified it for the following bargaining unit:

*"All employees of The Shopping Channel, Division of Rogers Broadcasting Limited, in its Broadcast Operations, in the Province of Ontario, excluding clerical, models, show hosts, staging designers, supervisors and those above the rank of supervisors."*

The evidence produced at the hearing supported, in general terms, the relevant constitutional facts upon which the Board relied in order to reach its decision in this matter. Those facts are set out in the report of the Board's investigating officer:

*"TSC buys products that it plans to sell. It then decides which products are going to be advertised on air, by whom, at which times etc. In their premises located at 1400 Castlefield Avenue in Toronto, the employer has a recording studio, with various sets for on air programming. Employees of TSC prepare the products for viewing including photographing the items, setting up displays, and placing props and samples of the items on the set. In the studio there are three (3) television cameras, two (2) which are operated by a TSC employee and one (1) which is fixed on one location, on the items being advertised for sale. The cameras roll and a show host(s) promotes and demonstrates live, on air, each product up for sale. A telephone number is telecast across the screen for consumers to phone to order goods advertised, and TSC employees answer the phones and take the orders."*

More than just TSC personnel is involved in the sale of its inventory to the consumer through television sales. First TSC purchases, prepares for air and records live on air the promotion of the product as described in the preceding paragraph. Then the picture is transmitted through fibre threads which are connected to master control at TSC's premises and which transmit the signal to a collective centre called 'head ends'. These fibres were installed and are maintained by another subsidiary of Rogers, named Rogers Network Services. (hereinafter referred to as 'RNS') RNS is a competitive access provider (CAP).

RNS contracts with TSC to carry the television programs from TSC's studio to the 'head ends', and then to distribute them to the various cable and satellite companies. There are no RNS employees permanently stationed on TSC's premises. There are switches on TSC's premises where the actual transmission can be commenced or terminated but since TSC operates round the clock they are rarely used since the line from the studio to the 'head ends' is permanently open. Once the picture reaches the 'head ends', it is then picked up by the cable or satellite companies for transmission into the consumers' homes. RNS has authorization from the CRTC to carry the signal from the TSC studio to the 'head ends' but not to deliver the program directly to homes.

In February, 1988, in response to enquiries and a complaint concerning a home shopping service being operated by the predecessor to TSC, Canadian Home Shopping Network (hereinafter referred to as 'CHSN'), the Canadian Radio-television and Telecommunications Commission (hereinafter referred to as 'CRTC') issued a public notice expressing its views on the meaning of the terms 'programming service' and 'alphanumeric service' used in the Cable Television Regulations 1986, particularly as those terms relate to CHSN. CHSN had argued that its service did not fall within the definition of a 'programming service' because a programming service must be designed to inform or entertain the public, and CHSN's service consisted exclusively of a series of commercial messages. CRTC found, in part, that 'CHSN's service cannot be excluded from a 'programming service' on the grounds advanced by CHSN.' (Please note that Section 3 of the CRTC regulation provide that a licensee shall not use its system to distribute 'programming services' except as authorized by CRTC regulations or a CRTC issued licence.)

*In regard to the 'alphanumeric services', the CRTC, after viewing some CHSN's tapes, concluded that 'the service did not fall entirely within the definition of an "alphanumeric service."' (Please note that 'alphanumeric services' are specifically excluded from the programming services definition and as such could be distributed without the CRTC's authorization.) At the request of CHSN, a meeting was held in February, 1988, between representatives of CHSN and the CRTC to discuss the issue of whether CHSN's service falls within the definition of 'alphanumeric service'. Following that meeting, in a letter dated February 5, 1988, from CHSN to the CRTC, CHSN wrote that it intended to submit applications for non-exclusive home shopping service network licences and, in the interim period it would '... continue to operate as an alphanumeric service, while making certain adjustments to our formats to meet the Commission's principal concerns, as expressed to us at the meeting with staff.' The CRTC concluded that cable licensees could continue to distribute CHSN's service, provided it was 'modified to take into account the foregoing comments.' (Please see a copy of the CRTC's Public Notice dated February 24, 1988, attached and marked 'Attachment No. 1'.)*

*In 1989, CHSN applied to the CRTC for a broadcasting license to operate a national, English and French language, 24 hours per day, tele-shopping specialty programming service, using full motion video.*

*The application was denied by the CRTC on the grounds that the bulk of CHSN's programming would fall within the definition of a commercial message set out in the CRTC regulations, and approval of the application would constitute an exception to the CRTC's general policy not to permit licensees of specialty programming networks to broadcast in excess of 12 minutes of commercial messages per hour. (Please see a copy of the majority decision of the CRTC, dated May 25, 1989, attached and marked 'Attachment No. 2'.)*

*In June, 1993, the CRTC issued a Public Notice entitled 'Call for Applications for Licences to Carry on New Canadian Specialty, Pay Television and Pay-Per-View Programming Undertakings'. In response to the call, the CRTC received several applications, including some proposing home shopping services. In December, 1993, the CRTC issued a call for comments 'regarding whether, and under what circumstances those proposing to carry on undertakings offering home shopping or and/or infomercial services should be*



*exempted from licensing requirements.' (Please see a copy of the CRTC's Public Notice dated December 8, 1993, attached and marked 'Attachment No. 3'.)*

*Subsequently, in January, 1995, the CRTC granted an exemption order respecting tele-shopping programming service undertakings. The order exempts persons operating undertakings that offer tele-shopping services from the requirement to hold a broadcasting licence. (Please see a copy of the exemption order dated January 26, 1995, attached and marked 'Attachment No. 4'.)"*

From the description of TSC's operations, the Board concludes that TSC is the creative and technical source of the broadcast signal and that TSC retains control over this signal such that, on any given day, it decides whether or not to broadcast and what to broadcast. In addition, TSC is indisputably treated by the CRTC, as was its predecessor CHSN, as a tele-shopping programming undertaking subject to CRTC jurisdiction. The CRTC exercised its jurisdiction by exempting TSC from having to hold a broadcast license. Therefore, TSC may broadcast legally if it chooses to do so.

### **The Union's Submissions**

CEP argues that TSC is a federal undertaking. Ultimately, it submits, the Board's jurisdiction turns on whether TSC's operation is subject to Parliament's constitutional authority.

In that light, the union argues that TSC's operation is covered by the Broadcast Act. The CRTC treated TSC's operation as if it were covered by the Broadcast Act, and TSC never objected to this federal jurisdiction. In fact, TSC complies with the definition of a programming undertaking within the meaning of the Broadcast Act, as was decided by the CRTC with respect to TSC's predecessor, CHSN, in accordance with the CRTC regulations then in force (section 3 of the Cable Television Regulations, 1986). This, for the union, is sufficient and distinguishes this case from

Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al., [1983] 1 S.C.R. 147.

In the alternative, CEP submits that TSC is integral to the operations of cable distributors, which are undeniably federal undertakings. Functionally speaking, there is no reason for the existence of cable distributors absent programming. The programming undertaking is thus an integral part of the core federal undertaking.

### **The Employer's Submissions**

The employer submits that TSC is not a broadcaster. TSC does not hold a CRTC license to broadcast. Any broadcasting is done by Rogers Network Services ("RNS"), which picks up the live signal from the TSC studio and delivers it to various cable distributors. TSC's activities are limited to the production of programming, the direct marketing and sale of products, and the delivery of those products to its customers. TSC has no equipment or ability to electronically transmit the programs it produces. TSC purchases air time from different cable companies in the same way as any commercial or infomercial company.

To the union's alternative submission, the employer submits that TSC operates independently from the core federal undertaking, much as independent production houses have been found to operate independently from broadcasting enterprises that buy their product (see Paul L'Anglais, supra).

### **The Decision**

Nothing in this case turns on the fact that TSC derives its income mainly from retail sales. The Board must determine whether the principal manner in which TSC sells its goods makes it a federally regulated business, thereby constituting a federal undertaking pursuant to section 4 of the Code. In addition, as CEP has only applied

to represent those employees engaged in the employer's broadcasting operations, there is no question as to the divisibility of the enterprise's retail and broadcasting operations.

The Supreme Court of Canada has had the opportunity, on more than one occasion, to define the limits of federal jurisdiction over labour relations and the nature of federal works and undertakings which are within Parliament's legislative authority with respect to labour relations.

In Northern Telecom Limited v. Communication Workers of Canada et al., [1980] 1 S.C.R. 115, the Supreme Court set out the basic principles as follows:

*"The best and most succinct statement of the legal principles in this area of labour relations is found in Laskin's Canadian Constitutional Law (4th ed., 1975) at p. 363:*

*'In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in so far as they are merely a facet of particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...'*

*In an elaboration of the foregoing, Mr. Justice Beetz in Construction Montcalm Inc. v. Minimum Wage Commission [[1979] 1 S.C.R. 754] set out certain principles which I venture to summarize:*

*(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.*

*(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*

*(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*

*(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.*

*(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.*

*(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity."*

(pages 131-132)

An undertaking may be found to be federal as a separate entity or as an integral part of a core federal undertaking (see United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112). In either case, the nature of the operation, having regard to its normal or habitual activities, must be examined. The Board will therefore first determine whether TSC, as a separate entity, constitutes a federal undertaking. If it does not, the Board will examine whether or not TSC is an integral part of a core federal undertaking. If TSC is a federal undertaking on either ground, the Board must finally decide whether Parliament intended the Code to apply to such undertakings.

TSC's normal and habitual activities are set out above. The Board must determine whether these activities amount to "broadcasting," which, neither party contests, is a federally regulated industry.



In Paul L'Anglais, supra, the Supreme Court held that a production company was not a federal undertaking because it did not comply with the definition of broadcasting set out in the Broadcasting Act, R.S.C. 1970, c. B-11:

*"Turning to the second stage, examining the nature of respondents' respective operations, I think it is sufficient to refer to the legislative definitions of 'broadcasting' and of 'radiocommunication' to see that the sale of time for sponsored programs and the production of programs and commercial messages broadcast by other persons are not activities falling within this field of federal jurisdiction. These definitions are to be found in s. 2 of the Broadcasting Act, R.S.C. 1970, c. B-11:*

*'broadcasting' means any radiocommunication in which the transmissions are intended for direct reception by the general public;*

*'radiocommunication' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide;*

*Neither of the two respondents is concerned with the transmission, emission or reception of signs, signals, writing, images, sounds or intelligence."*

(pages 168-169)

The relevant definitions of the Broadcasting Act, S.C. 1991, c. 11, read as follows:

*"2. (1) 'broadcasting' means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;*

*'broadcasting undertaking' includes a distribution undertaking, a programming undertaking and a network;*

*'program' means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;*

*'programming undertaking' means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus; ..."*

Section 4(2) of that Act provides in part as follows:

*"4.(2) This Act applies in respect of broadcasting undertakings carried on in whole or in part within Canada ..."*

As in its 1987 and 1995 decisions, the CRTC clearly assumes that CHSN and now TSC comply with the definition of a programming undertaking. The CRTC regulated TSC's operations by exempting it from licensing requirements provided it continues to conform to certain conditions. The CRTC therefore determined that TSC's day-to-day operations consist in broadcasting, that is to say it indirectly transmits programs over provincial boundaries for reception by the public.

TSC sought to separate itself from broadcasting by arguing that it does not broadcast, but rather produces infomercials in house, and pays RNS and other companies to distribute them. In the Board's opinion, this argument is unfounded. As noted above, the transmission originates with TSC, which has not relinquished control over the decision to broadcast or the content of its programming. TSC is an essential link in the broadcasting chain. Once this is established, the fact that TSC turned to RNS to carry its signal to the cable or satellite distributors does not make it any less a programming undertaking within the meaning of the Broadcast Act.

The Board draws support for its conclusion from Capital Cities Communications Inc. v. C.R.T.C., [1978] 2 S.C.R. 141:

*"The fallacy in the contention on behalf of the Attorney-General of Ontario and of the Attorneys-General of Quebec and of British Columbia, and, indeed, of the appellants, is in their reliance on the technology of transmission as a ground for shifting constitutional competence when the entire undertaking relates to and is dependent on extra-provincial signals which the cable system receives and sends on to subscribers. It does not advance their contentions to urge that a cable distribution system is not engaged in broadcasting. The system depends upon a telecast for its operation, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers.*

...

*I cannot accept the submission made on behalf of the Attorney-General of Ontario that there are two undertakings involved in the operation of a cable distribution system, which receives and transmits television signals, simply because the transmission of the same signal to subscribers that it receives through Hertzian waves is done through a different technology."*

(pages 159 and 163; see also Public Service Board et al. v. François Dionne et al., [1978] 2 S.C.R. 191)

These cases endorse the proposition that, leaving aside the question of closed-circuit television within the boundaries of a province, broadcasting is subject to federal regulation from transmission to reception. According to that reasoning, federal competence over broadcasting cannot be avoided by using different corporate entities to carry out the necessary steps to broadcast programming. Here, RNS, as a mere conduit for TSC's transmissions, is subject to federal regulation, but not to the exclusion of TSC.

Similarly, the fact that TSC pays RNS and Rogers Cable to carry its signal does not change the nature of its day-to-day operations for constitutional purposes. Once it is established that TSC is an essential broadcasting link, the particular commercial arrangements it has entered into do not make it any less a federal undertaking. The Board sees no difference, for example, between TSC and a licensed specialty channel which, presumably, Rogers would pay for the privilege of carrying its programming. In both cases, the decision whether or not to transmit and the day-to-day control over the content of the transmission lie with the programming undertaking at the origin of the transmission. Following the reasoning of the Supreme Court of Canada, both undertakings would necessarily be engaged in broadcasting.

Based on the evidence produced, the Board sees no reason to disagree with the CRTC's assessment of TSC's activities. TSC is clearly a programming undertaking within the meaning of the Broadcasting Act. It follows that TSC is a federal undertaking pursuant, at least, to section 92(10)(a) of the Constitution Act, 1867.

The employer further argued that the Board does not necessarily have jurisdiction over an undertaking because aspects of that undertaking are regulated by Parliament. The point is well taken, but it does not help the employer's position in the present case. This is not a case of the Board taking jurisdiction over a provincial utility because it uses meters to measure consumption or over the activities of a federally incorporated company. If TSC is engaged in broadcasting on a regular and continuous basis, as the Board found it to be, it is a federal undertaking as that term is understood by the Supreme Court in Northern Telecom, *supra*. Federal power over federal undertakings, such as those which fall under the jurisdiction of Parliament by virtue of section 92(10)(a), while not plenary, includes power over the undertaking as a going concern. As set out by the Supreme Court in Re Eastern Canada Stevedoring Company Limited, [1955] S.C.R. 529, jurisdiction over labour relations is an integral part of such jurisdiction:



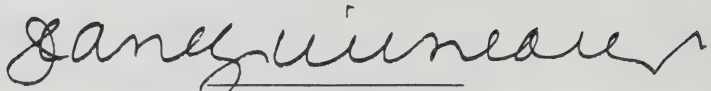
*"The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures."*

(page 592; see also Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; and Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327)

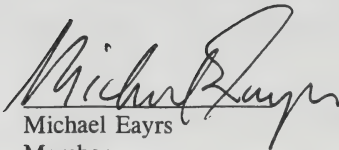
Parliament therefore has jurisdiction to regulate TSC's labour relations. Given its conclusion on this issue, the Board need not consider the union's alternative submission that TSC is an integral part of another federal undertaking.

For the Board to have jurisdiction to certify the employees in question here, TSC must be found to be a federal work, undertaking or business pursuant to sections 2 and 4 of the Code. Section 2 of the Code defines "federal work, undertaking or business" as any work, undertaking or business that is within Parliament's legislative authority of Parliament. Section 2(b) specifies that such works, undertakings or businesses include any "work or undertaking connecting any province with any other province, or extending beyond the limits of a province." This language mirrors the language of section 92(10)(a) of the Constitution Act, 1867. Parliament clearly intended for such federal undertakings to be governed by the Code. Therefore, for the reasons set out above, the Board finds that TSC is an undertaking within the authority of Parliament and a federal undertaking pursuant to section 4 of the Code.

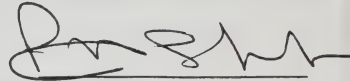
This is a unanimous decision of the Board.



Jean L. Guilbeault, Q.C.  
Vice-Chair



Michael Eayrs  
Member



Patrick H. Shafer  
Member

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## Summary

Canadian Broadcasting Corporation,  
*complainant*, Communications, Energy and  
Paperworkers Union of Canada, *et al.*  
*respondents*.

Board File: 745-5273

Communications, Energy and Paperworkers  
Union of Canada, *complainant*, and Canadian  
Broadcasting Corporation, *respondent*.

Board File: 745-5274

Canadian Union of Public Employees,  
*complainant*, and Canadian Broadcasting  
Corporation, *respondent*.

Board File: 745-5275

Canadian Media Guild, *complainant*, and  
Canadian Broadcasting Corporation,  
*respondent*.

Board File: 745-5371

CLRB/CCRT Decision no. 1201  
April 21, 1997

## Résumé

Société Radio-Canada, *plaignant*, Syndicat  
canadien des communications, de l'énergie et  
du papier, *et al. intimées*.

Dossier du Conseil: 745-5273

Syndicat canadien des communications, de  
l'énergie et du papier, *plaignant*, Société  
Radio-Canada, *intimée*.

Dossier du Conseil: 745-5274

Syndicat canadien de la fonction publique,  
*plaignant*, Société Radio-Canada, *intimée*.

Dossier du Conseil: 745-5275

Guilde des services de presse du Canada,  
*plaignant*, Société Radio-Canada, *intimée*.

Dossier du Conseil: 745-5371

CLRB/CCRT Décision n° 1201  
le 21 avril 1997



An employer and the bargaining agents for  
each of three certified bargaining units filed  
unfair labour practice complaints against each  
other. At issue was an agreement entered into  
by three bargaining agents, which contained  
provisions indicating that none of the trade  
unions would conclude a collective agreement  
without the consent of the others. The  
employer alleged a failure to bargain in good

Les parties, un employeur et les agents  
négociateurs de chacune de trois unités de  
négociation accréditées, ont déposé l'une  
contre l'autre des plaintes de pratique déloyale  
de travail. Le litige portait sur une entente  
conclue entre les trois agents négociateurs  
selon laquelle aucun des syndicats ne  
conclurait de convention collective sans le  
consentement des autres. L'employeur a

faith contrary to section 50(a), and maintained that the agreement was unlawful and being pressed to impasse. The trade unions complained that employer unwillingness to bargain under such circumstances was itself a violation of section 50(a), or, interference with trade union representation contrary to section 94(1)(a) of the Code.

The complaints were dismissed. The matter was moot as collective agreements had been concluded since adjournment of the Board's hearing. No valid labour relations purpose would be served by determining the complaints on their merits. The Board made general comments concerning the autonomy of the bargaining agent and its choice of negotiating representative and bargaining posture.

allégué que les agents négociateurs avaient manqué au devoir de négocier de bonne foi prévu à l'alinéa 50a); il a soutenu également que l'entente était illégale et menait à l'impasse. Les syndicats ont prétendu que le refus de l'employeur de négocier dans de telles circonstances constituait en soi une violation de l'alinéa 50a) ou une intervention dans la représentation des employés par les syndicats, ce qui allait à l'encontre de l'alinéa 94(1)a) du Code.

Les plaintes ont été rejetées. L'affaire n'avait pas de raison d'être, des conventions collectives ayant été conclues depuis l'ajournement de l'audience du Conseil. Il n'aurait servi à aucune fin valable en matière de relations du travail de statuer sur le bien fondé des plaintes. Le Conseil a fait de observations générales sur l'autonomie de l'agent négociateur et sur son choix de représentant et de méthode de négociation.

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## Reasons for decision

Canadian Broadcasting Corporation,

*complainant,*

*and*

Communications, Energy and Paperworkers  
Union of Canada; Canadian Wire Service  
Guild, Local 213; and Canadian Union of  
Public Employees,

*respondent.*

Board File: 745-5273

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Communications, Energy and Paperworkers  
Union of Canada,

*complainant,*

*and*

Canadian Broadcasting Corporation,

*respondent.*

Board File: 745-5274

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Canadian Union of Public Employees,

*complainant,*

*and*

Canadian Broadcasting Corporation,

*respondent.*

Board File: 745-5275

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Canadian Media Guild,

*complainant,*

*and*

Canadian Broadcasting Corporation,

*respondent.*

Board File: 745-5371

CLRB/CCRT Decision no. 1201

April 21, 1997

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, and Ms. Sarah E. FitzGerald and Mr. David Gourdeau, Members. A hearing was held on February 28 and August 12, 1996, in Toronto, Ontario.

Appearances

Mr. R. Heenan, Mr. G. Dufort and Mrs. E. Bourassa, for the Canadian Broadcasting Corporation;

Mr. D. Roberts and Mr. G. Hunter, for the Communications, Energy and Paperworkers Union of Canada;

Mr. A. Golden and Mr. D. Oldfield, for the Canadian Wire Service Guild, Local 213 of the Newspaper Guild; and

Mr. K. Hopper and Mr. G. Johnson, for the Canadian Union of Public Employees.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman, and Ms. Sarah E. FitzGerald, Member.

## I

Each of the trade unions that is a party to these proceedings is certified as bargaining agent for a particular unit of employees of the Employer. The certifications were issued following lengthy proceedings to review the bargaining unit structure at CBC. The number of bargaining units is now greatly reduced.

During the last bargaining round in respect of the three bargaining units involved in these proceedings, the Employer alleged that the bargaining agent for one of the units was failing to bargain in good faith, contrary to section 50(a) of the Code. In turn, each of the unions filed a complaint against the Employer, alleging a failure on the Employer's part to bargain in good faith or, interference with union representation of employees pursuant to section 94(1)(a) of the Code.

At issue in the various complaints is a written Joint Bargaining Agreement entered into by the three bargaining agents, and provisions indicating none of the three unions would enter into a collective agreement with the Employer without the others' consent.

During bargaining, it is of course the duty of a bargaining agent and of the Employer to bargain in respect of the bargaining unit for which the union is certified. In respect of the three units in question, negotiations did take place, and since the adjournment of these proceedings in February 1996, collective agreements for each of the three units were concluded.

Initially, negotiations took place jointly, based upon an interest-based bargaining process agreed to by the three unions and the Employer. However, after a period of time, the Employer exercised its right to end and withdraw from bargaining on this basis. When bargaining resumed, the Employer intended to negotiate separately with the bargaining agents for each of the three units. CBC found however that in addition to representatives of the certified bargaining agent, representatives of the other two

unions were either present at each bargaining unit's negotiation table or being consulted about new developments. Negotiations broke down. Aware of the Joint Bargaining Agreement concluded by the three unions, the Employer filed its complaint to the Board, claiming that it was being improperly forced to bargain jointly with the three bargaining agents. The Employer maintains that the Joint Bargaining Agreement is unlawful and was being pressed to the point of an impasse. It was in part, the Employer's unwillingness to bargain under these conditions that gave rise to the union complaints of Employer interference and bad faith bargaining.

## II

The Employer characterizes the Joint Bargaining Agreement as an attempt to achieve indirectly what could not be achieved directly, namely the establishment of a council of trade unions as bargaining agent. It should be noted that following the previously mentioned Board review of the bargaining structure at CBC, the Board rejected an application filed by a council of trade unions to act as bargaining agent for one of the bargaining units involved in these proceedings. There was no such application by any council of trade unions in respect of all three bargaining units.

In this case, the Employer is not being expressly asked to recognize, or to bargain with, a council of trade unions -- if one exists -- in respect of any or all of the three bargaining units in question. Each of the three unions remains the bargaining agent for the unit for which it is certified, and subject to the duty to bargain to which we have referred.

The Employer's assertions concerning the Joint Bargaining Agreement raise the serious question of the autonomy of a bargaining agent with respect to its choice of representative in negotiations, and with respect to its bargaining posture.

We would agree that the unions could not require the Employer to bargain with all three unions jointly in respect of each bargaining unit. That would be an abdication



of each union's individual responsibility to bargain with the Employer in respect of the bargaining unit for which it is certified, and it would impose on the Employer a duty greater than that imposed by the Code, namely to bargain with the exclusive certified bargaining agent. Indeed, it would be an offence for the Employer to bargain with anyone other than the certified bargaining agent in respect of employees in any particular bargaining unit.

That said, either party may choose its own representative for bargaining purposes and may, subject to reasonable limitations, invite appropriate interested persons to be present during negotiations. More importantly perhaps, any party to bargaining is entitled to develop its own criteria as to the provisions it is willing to agree to. It frequently happens that negotiations are recessed while parties consult their advisors or their principals. It is, at least as a general matter, immaterial whether such consultation is publicized or not.

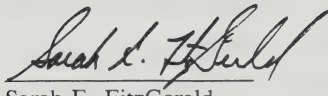
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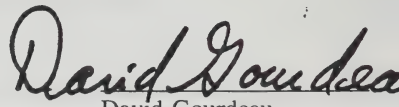
The Employer asks the Board to determine whether the Joint Bargaining Agreement is legal. Assuming for the moment that an inquiry into this agreement among the trade unions would resolve the issues in the complaints, in the Board's view, evidence might not only be required concerning the provisions of the agreement, but also, conduct during negotiations that can be attributed to them.

Given that collective agreements have been concluded in respect of each of the three units in question, we do not consider it appropriate to hear what could be lengthy and contentious evidence concerning the agreement and its application. The matter is moot, and after hearing arguments from the parties on this point, we conclude that no valid labour relations purpose would be served by determining these complaints on their merits at this time.

Accordingly, the complaints in the above-noted files are dismissed.

  
J.F.W. Weatherill  
Chairman

  
Sarah E. FitzGerald  
Member

  
David Gourdeau  
Member

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## Summary

British Columbia Nurses' Union, *applicant*, and Gitxsan Treaty Society, Nisga'a Valley Heath Board and Hospital Employees' Union, *respondents*.

Board Files: 530-2579  
530-2580  
CLRB/CCRT Decision no. 1202  
May 29, 1997

These are applications for reconsideration of Letter Decisions 1552 and 1554 issued on July 5, 1996 in which the Board determined it appropriate to certify one bargaining unit for all employees concerned, granted the application filed by the Hospital Employees' Union and declared that an "all-employee" unit, including graduate nurses, was appropriate.

The questions referred to the full Board were the following: (1) Given the presumption contained in section 27(3) of the Code that the unit appropriate for collective bargaining is one comprised of only professional employees and that the Board must therefore certify professionals in a separate bargaining unit unless such a unit "would not otherwise be appropriate for collective bargaining," is the Board's discretion limited such that it must find and take into account particular factors or specific and compelling evidence that a unit comprised only of professionals is not otherwise appropriate for collective bargaining? (2) In light of the answer to the foregoing, what disposition should be made of the case?

## Résumé

British Columbia Nurses Union, *requérante*, ainsi que Gitxsan Treaty Society, Nisga'a Valley Heath Board et Hospital Employees' Union, *intimés*.

Dossiers du Conseil: 530-2579  
530-2580  
CLRB/CCRT Décision n° 1202  
le 29 mai 1997

Il s'agit de demandes de réexamen des décisions-lettres n°s 1552 et 1554, rendues le 5 juillet 1996, dans lesquelles le Conseil a jugé qu'il y avait lieu d'accréditer une unité de négociation composée de tous les employés visés, a agréé la demande présentée par le Hospital Employees' Union et a déclaré qu'une unité regroupant «tous les employés», y compris les infirmières diplômées, était habile à négocier.

Les questions renvoyées au Conseil réuni en séance plénière sont les suivantes. (1) Vu la présomption que renferme le paragraphe 27(3) du Code, soit que l'unité habile à négocier collectivement est celle qui ne regroupe que des membres de profession libérale et que le Conseil doit donc accréditer à leur égard une unité de négociation distincte, sauf si cette unité «n'est pas par ailleurs habile à négocier collectivement», la discrétion du Conseil est-elle limitée au point qu'il doive conclure à l'existence et tenir compte de facteurs particuliers ou d'éléments de preuve explicites et convaincants qu'une unité ne regroupant que des membres de profession libérale n'est pas par ailleurs habile à négocier collectivement? (2) Selon la réponse à cette question, comment doit-on trancher l'affaire?

Once the professional nature of the unit is established, section 27(3) presupposes the certification of that professional unit, unless the Board determines that the unit of professionals so constituted is not otherwise appropriate for collective bargaining. A finding that the unit is not otherwise appropriate for collective bargaining must be specific and supported by compelling evidence. The Board may not refuse to refuse to certify a professional unit on the broad discretionary basis normally vested in the Board.

In light of the foregoing, the full Board is of the view that section 27(3) requires the Board to determine, where a unit is properly termed professional, that such a unit is appropriate for collective bargaining. Only where the Board determines that a professional unit "would not otherwise be appropriate for collective bargaining" may it deviate from the presumption of appropriateness. The determination of an appropriate bargaining unit is a question of fact, and in the instant case, should be made by the original panel. The answer to the first question is then "yes" and, as to the second question, the matter is referred back to the original panel for determination in the light of the foregoing.

Une fois que la nature professionnelle de l'unité est établie, le paragraphe 27(3) presuppose l'accréditation, sauf si le Conseil détermine que l'unité ainsi constituée n'est pas par ailleurs habile à négocier collectivement. La conclusion que l'unité n'est pas par ailleurs habile à négocier collectivement doit être explicite et reposer sur des éléments de preuve convaincants. Le Conseil ne peut refuser d'accréditer une unité professionnelle en invoquant le pouvoir discrétionnaire généralement dont il est normalement investi.

Compte tenu de ce qui précède, le Conseil réuni en séance plénière est d'avis que le paragraphe 27(3) exige que le Conseil détermine, lorsqu'une unité est à bon droit jugée professionnelle, que cette unité est habile à négocier collectivement. Le Conseil ne peut déroger à la présomption d'habileté à négocier que lorsqu'il détermine que l'unité professionnelle «ne serait pas par ailleurs habile à négocier collectivement». L'habileté à négocier d'une unité de négociation est une question de fait et, en l'espèce, la détermination doit en être faite par le banc initial. La réponse à la première question est donc «oui» et, quant à la deuxième question, l'affaire est renvoyée au banc initial pour qu'il prenne une décision à la lumière de ce qui précède.

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## Reasons for decision

British Columbia Nurses' Union

*applicant,*

*and*

Gitksan Treaty Society, as represented by the  
Gitksan Health Authority and Hospital  
Employees' Union

*respondents.*

Board File: 530-2579

British Columbia Nurses' Union

*applicant,*

*and*

Nisga'a Valley Health Board and  
Hospital Employees' Union

*respondents.*

Board Files: 530-2580

CLRB/CCRT Decision no. 1202

May 29, 1997

This matter was considered by the full Board meeting in a plenary session on April 1, 1997 in Ottawa. The Board was comprised of J.F.W. Weatherill, Chairman, L. Doyon, J.P. Morneau, J.L. Guilbeault, Q.C., R.I. Hornung, Q.C., and S. Handman, Vice-Chairs, and M. Eayrs, P.H. Shafer, S.E. FitzGerald, R. Aronovitch and D. Gourdeau, Members.

The reasons for decision were written by J.F.W. Weatherill, Chairman and Richard I. Hornung, Q.C., Vice-Chair.

Appearances (on record)

Mr. P. Dickie, counsel for the British Columbia Nurses' Union, applicant;  
Mr. J. Coutts, counsel for the Gitxsan Treaty Society;  
Ms. C. Askew, counsel for the Hospital Employees' Union;  
Ms. L. Whyte, counsel for Hospital Employees' Union; and  
Mr. J. S. Clyne, counsel for the Nisga'a Valley Health Board, respondents.

I

These are applications for reconsideration of Board Letter Decisions rendered in Gitxsan Treaty Society, as represented by the Gitxsan Health Authority, July 5, 1996 (LD1552), and in Nisga'a Valley Health Board, July 5, 1996 (LD 1554).

In Gitxsan Treaty Society, supra, the Board considered applications in files 555-3942, in which the British Columbia Nurses' Union (BCNU) sought to be certified for the graduate nurses employed by the Gitxsan Health Authority, and in 555-3958, wherein the Hospital Employees' Union (HEU) sought to be certified for all the employees providing community health services at and from locations within the Gitxsan Community, excluding graduate nurses and medical doctors. In its decision the Board determined it appropriate to certify one bargaining unit for all employees and granted the application filed by the Hospital Employees' Union in 555-3958, and dismissed the application filed by the British Columbia Nurses' Union in 555-3942.

In Nisga'a Valley Health Board, supra, the same panel of the Board considered applications in files 555-3941, filed by the British Columbia Nurses' Union to represent a separate unit of graduate nurses, employed by the Nisga'a Valley Health Board and in 555-3955 filed by the Hospital Employees' Union for a bargaining unit of all employees of this employer, providing community health services, but excluding the graduate nurses. Although the HEU had not opposed the application by the

BCNU to be certified as bargaining agent for a unit of graduate nurses, the Board determined however, without any reference to section 27(3) of the Code, that an "all-employee" unit, including graduate nurses, was appropriate, certified the HEU in respect of that unit, and dismissed the application of the BCNU.

On March 13, 1997, a reconsideration panel of the Board, having studied the parties' submissions in the reconsideration applications, advised the parties that the issues in these cases concerning the application of section 27(3) of the Canada Labour Code raised questions of law and Board policy which must be referred to the full Board, sitting in plenary session. The parties made further submissions, and the matter was considered by the full Board on April 1, 1997.

The questions referred to the full Board were the following:

*"1. Given the presumption contained in section 27(3) of the Code - that the unit appropriate for collective bargaining is one comprised of only professional employees and that the Board must therefore certify professionals in a separate bargaining unit unless such a unit "would not otherwise be appropriate for collective bargaining":*

*- is the Board's discretion limited such that it must find and take into account particular factors or specific and compelling evidence that a unit comprised only of professionals is not otherwise appropriate for collective bargaining?*

*2. In light of the answer to the foregoing, what disposition should be made of the case?"*

## II

The relevant provisions of section 27 provide as follows:

*"27.(2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.*

*(3) Where a trade union applies under section 24 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsections (2) and (4), shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining.*

*(4) In determining that a unit is appropriate for collective bargaining under subsection (3), the Board may include in the unit*

*(a) professional employees of more than one profession; and*

*(b) employees performing the functions, but lacking the qualifications, of a professional employee."*

Under its predecessor legislation, the Industrial Relations and Disputes Investigation Act, 1952 S.C. c.152, professionals were excluded from the definition of "employee" and therefore were not statutorily subject to be organized for the purposes of bargaining collectively. When Parliament replaced that legislation with the new Part V of the Canada Labour Code, 1972, S.C. c.18 the exclusion of professionals was removed. In paragraph 125(3)(a) (now 27(3)), Parliament enacted what this Board, in Bell Canada (1976), 19 di 117; [1976] I can LRBR 345; and 76 CLLC 16, 016 (CLRB no. 62), referred to as "a clear legislative preference for units comprising only professional employees" (pages 123; 350; and 473); (see also: Nova Scotia Nurses Union, Devco Local v. Canada (Labour Relations Board), [1990] 3F.C. 652(C.A.)).

By enacting section 27(3), Parliament made specific provision to include professionals as "employees" so as to permit them to invoke the terms of the Code for the purposes of joining together to bargain collectively. In Bell Canada, supra, the Board, after noting Parliament's legislative preference for professional units, concludes that, in circumstances where section 27(3) of the Code applies:

*"The Board must grant certification for such a unit 'unless such a unit would not otherwise be appropriate for collective bargaining'.*



*Thus, in the absence of evidence to the contrary, the Board must conclude that such a unit is appropriate for collective bargaining. ..."*

(Bell Canada, supra, pages 123; 350-351; and 473)

The Board further observed that:

*"The provisions of the Canada Labour Code regarding professional employees, particularly the provisions of subsection 125(3), create special exceptions to the basic provisions of the statute..."*

(pages 124; 351; and 474 emphasis added)

For the purposes of the Code, the term "professional employee" contemplates:

*"...that only professionals who normally perform the type of work which is usually reserved to members of their profession may avail themselves of these provisions. For the purposes of the Canada Labour Code, 'professional employee' means not only a person having the necessary qualifications but a person who performs work of such a nature that it requires the application of the 'specialized knowledge' acquired in the course of securing those qualifications."*

(pages 124; 351-352; and 474)

That the nurses covered by the original application are "professionals" within the meaning of the Code is not in dispute. There would therefore appear to be no doubt that section 27(3) applies in the instant case: the BCNU is a trade union, and it applied under section 24 for certification as the bargaining agent for a unit comprised of professional employees. Accordingly, once the professional nature of the unit had been determined, the only issue which remained for the original panel was whether or not the unit of professional nurses, as applied for, constituted a unit which was not otherwise appropriate for the purposes of bargaining collectively.

### III

Once the professional nature of the unit is established, section 27(3) pre-supposes the certification of that professional unit, unless the Board determines that the unit of professionals so constituted is not otherwise appropriate for collective bargaining purposes. This presumptive intention was recognized by the Board in Telelobe Canada (1988), 76 di 19; and 91 CLLC 16, 006 (CLRB no. 720):

*"As the Board stated in Bell Canada, supra:*

*'Nevertheless, the wording of paragraph 125(3)(a) seems to indicate a clear legislative preference for units comprising only professional employees.'*

...

*The Board perceived an unquestionable legislative preference for separate professional units: 'the Board ... **shall determine**.' What is more, this preference is found in the same section of the Code which gives the fullest discretion to this same Board with regard to all other employees, except private constables. We must therefore take this into account. This preference has been underlined.*

*In other words, except for professionals and private constables, the legislator invested the Board with the fullest discretion in determining what constitutes an appropriate bargaining unit.*

*'125. (3) ...*

...

*(b) **may** determine that professional employees of more than one profession be included in the unit; and ...'*

*(emphasis added)*

*That paragraph reinforces the presumption that the appropriate unit preferred by the legislator at paragraph (a) is a separate unit for each profession. Thus, while the Board **shall determine** at paragraph (a), it has discretion at paragraph (b) with respect to members of more than one profession: it 'may determine'".*

(pages 64; and 14,082)

Given the fact that section 27(3) creates a special exception to the basic provisions of the Code (Bell Canada and Teleglobes, *supra*) and establishes a presumption in favour of professional units, the Board can only dismiss an application for such a unit if it determines that the professional unit is not otherwise appropriate for collective bargaining. In our view, such a finding must be specific and supported by compelling evidence to the contrary. In reaching an adverse conclusion in this regard, it is incumbent on the Board to find particular factors or specific and compelling evidence to the contrary that such a unit is not otherwise appropriate. It would not be sufficient, for example, to refuse to certify a professional unit on the broad discretionary basis normally vested in the Board; nor, for that matter on the comparative basis that another unit would be more appropriate.

This interpretation gives effect to Parliament's intention, in enacting sections 27(3) and (4) of the Code, to make provision for including professionals as employees. In keeping with the exceptional nature of the provisions passed by Parliament - to accommodate the inclusion of professionals within their own units - it is incumbent on the Board to ensure that such units are maintained, as applied for, unless compelling evidence to the contrary is found which militates against it. As indicated in Bell Canada, *supra*:

*"...in the absence of evidence to the contrary, the Board must conclude that such a unit is appropriate for collective bargaining..."*

(pages 123; 350; and 473)

The quid pro quo, so to speak, for including professionals as employees was to restrict the Board's normal discretion to determine an appropriate unit and to provide for specific units in which professionals would be included unless the Board determined that those units were not otherwise appropriate.

In reaching its determination in this regard, the Board must interpret and apply section 27(3) in a fashion which is in harmony with the objects and purposes of the Code and

its broad mandate to facilitate the rational administration of labour relations matters. However, the Board's broad discretion to determine an appropriate unit is, in our view, effectively restricted under section 27(3) to the extent that it must find and take into account particular factors or specific and compelling evidence that such a unit, comprised only of professionals, is not otherwise appropriate for collective bargaining.

For the Board to deny an application for certification of a professional unit of employees without first demonstrating that the unit so applied for was not otherwise appropriate, would, in effect, thwart the legislative preference for "professional" units as expressed in section 27(3) and render the statutory presumption in favour of professional units meaningless.

#### IV

In its decision Gitxsan Treaty Society, supra, the original panel dealt with both the application by the HEU and the application by the BCNU. On the question of "The appropriateness of the bargaining units", the Board wrote:

*"The Board has come to the conclusion that one bargaining unit for all employees of the Gitxsan Health Authority, including graduate nurses, is appropriate.*

*The nature of the work performed by the graduate nurses overlaps with some of the functions and duties of the Community Health Representatives to an extent sufficient to convince the Board that all employees should be included in a single bargaining unit. There is a community of interest between the graduate nurses and some employees in other classifications as well as a functional integration between all the employees of the Health Authority, including the graduate nurses."*

(page 4)



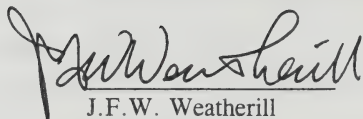
Insofar as it was dealing with the application for certification brought by BCNU, the original panel appears not to have given effect to the provisions of section 27(3). This was, as we have said, an application to which section 27(3) applied. It was an "application for certification as the bargaining agent for a unit comprised of ... professional employees" and in such a case the requirement of section 27(3) is clear: "the Board, ... shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees" - subject to the exception which immediately follows: "unless such a unit would not otherwise be appropriate for collective bargaining".

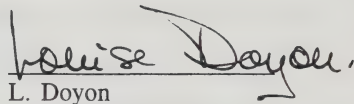
In the application by the BCNU, the original panel was required, by the operative language of section 27(3), to determine that the unit appropriate for collective bargaining was a "professional" unit. The panel would only be relieved of that requirement if the presumption in favour of such unit was rebutted by compelling evidence - as discussed above - that such a unit "would not otherwise be appropriate for collective bargaining". The original panel made no finding in that respect.


In light of the foregoing, the full Board is of the view that section 27(3) requires the Board to determine, in an application for certification for a "professional" unit, that such a unit is appropriate for collective bargaining. There is an exception to this requirement only if the Board determines that such unit "would not otherwise be appropriate for collective bargaining". While such determination would be made on the basis of the Board's criteria for determining the appropriateness or inappropriateness of bargaining units, it should take into consideration the legislative preference for "professional" units as expressed in that section. The determination of an appropriate bargaining unit is a question of fact, and in the instant case, should be made by the original panel.

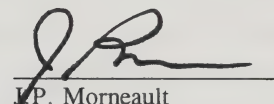
Accordingly, the answers to the questions submitted to the full Board are:

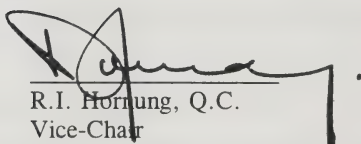
- 1: Yes.
- 2: The matter is referred back to the original panel for determination in the light of the foregoing.

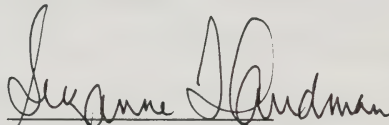
  
J.F.W. Weatherill  
Chairman

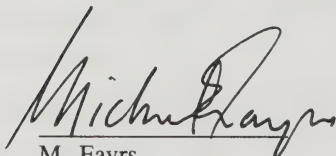
  
L. Doyon  
Vice-Chair

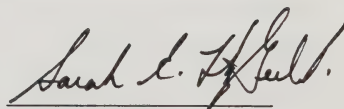
  
J.L. Guilbeault, Q.C.  
Vice-Chair

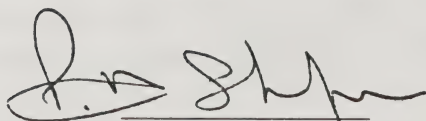
  
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Vice-Chair

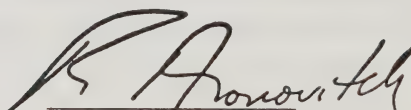
  
R.I. Hornung, Q.C.  
Vice-Chair

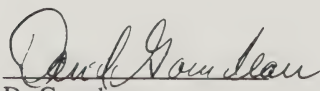
  
S. Handman  
Vice-Chair

  
M. Eayrs  
Member

  
S.E. Fitzgerald  
Member

  
P.H. Shafer  
Member

  
R. Aronovitch  
Member

  
D. Gourdeau  
Member

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# Information

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## Summary

Halifax Longshoremen's Association, Local 269 of the International Longshoremen's Association, *applicant* and Maritime Employers' Association and M&M Manufacturing Limited, *respondents*, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 73, *intervenor*.

Board Files: 530-2337, 725-353  
CLRB/CCRT Decision no. 1203  
May 22, 1997

The International Longshoremen's Association, Local 269 (ILA), filed an application with the Canada Labour Relations Board pursuant to sections 18, 34 and 92 of the Canada Labour Code.

The ILA maintains that M&M Manufacturing or M&M Fabricators, as the case may be, engaged in the longshoring business when its employees tied up, loaded and unloaded a ship at the Port of Halifax Terminal. The ILA says that the loading and unloading of cargo to and from commercial vessels in the Port of Halifax is longshoring work carried out by ILA 269.

M&M maintains its primary business is manufacturing. It is not working in the longshoring industry and that the unloading of the vessel at the dock, which is the work site, is part and parcel of the manufacturing process.

## Résumé

Halifax Longshoremen's Association, section locale 269 de l'Association internationale des débardeurs, *requérante*, Association des employeurs maritimes et M&M Manufacturing Limited, *intimées*, et Fraternité internationale des chaudronniers, constructeurs de navires en fer, forgerons, forgeurs et aides, section locale 73, *intervenante*.

Dossiers du Conseil : 530-2337, 725-353  
CLRB/CCRT Décision n° 1203  
le 22 mai 1997

L'Association internationale des débardeurs (AID), section locale 269, a présenté une demande au Conseil canadien des relations du travail en vertu des articles 18, 34 et 92 du Code canadien du travail.

L'AID soutient que M&M Manufacturing ou M&M Fabricators, selon le cas, a effectué du débardage lorsque ses employés ont amarré, chargé et déchargé un navire au terminal du port de Halifax. L'AID affirme que le chargement et le déchargement de marchandises transportées par des navires commerciaux au port de Halifax constituent des travaux de débardage effectués par la section locale 269 de l'AID.

M&M soutient que sa principale activité est la fabrication. Elle n'oeuvre pas dans le secteur du débardage, et le déchargement d'un navire au quai, qui est le lieu de travail, fait partie intégrante du processus de fabrication.

The Board found that M&M, through its actions of loading and unloading has, for the purposes of section 34 of the Code, extended itself into the longshoring industry. This decision only intends to cover that work which is considered part of the longshoring industry. As M&M stated it did not wish to be in the longshoring business, the Board appointed its officer in an attempt to settle the matter.

Le Conseil estime que, par ses activités de chargement et de déchargement, M&M pour l'application de l'article 34 du Code effectué du travail de débardage. La décision vise seulement les travaux qui sont considérés comme des activités de débardage. Étant donné que M&M a affirmé qu'elle ne désire pas faire de débardage, le Conseil a désigné un de ses agents pour tenter d'en arriver à un règlement.

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## Reasons for decision

Halifax Longshoremen's Association, Local 269  
of the International Longshoremen's  
Association,

*applicant,*

*and*

Maritime Employers' Association and M&M  
Manufacturing Limited,

*respondents,*

*and*

International Brotherhood of Boilermakers, Iron  
Ship Builders, Blacksmiths, Forgers &  
Helpers, Local 73,

*intervenor.*

Board Files: 530-2337, 725-353  
CLRB/CCRT Decision no. 1203  
May 22, 1997

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The Board was composed of Mr. J. Philippe Morneau, Vice-Chair, and Messrs. Calvin B. Davis and Patrick H. Shafer, Members. A hearing was held on November 9 and 10, 1994, in Halifax, N.S.

### Appearances

Mr. Ronald A. Pink, Counsel, for the applicant; and

Mr. Brian G. Johnston, Counsel, assisted by Messrs. Robert L. Fisher, Manager, Operations & Safety, MEA, and Steve Belding, Contract Administrator, MEA, and

Mr. Ronald E. Pizzo, for the respondents; and

Mr. John H. Graham, Counsel, for the intervenor.

These reasons for decision were written by Mr. Calvin B. Davis, Member, pursuant to section 11 of the Code.

I

These reasons deal with an application filed by the International Longshoremen's Association, Local 269, pursuant to sections 18, 34 and 92 of the Canada Labour Code. Subsequent to the public hearing, the Board's Director General sent a letter to the parties outlining the Board's bottom-line decision. The letter dated December 22, 1994 reads as follows:

*"After having heard the parties in evidence at hearings held in November 1994 in Halifax, N.S., a panel of the Canada Labour Relations Board consisting of Vice-Chairman J. Philippe Morneault and Members Calvin B. Davis and Patrick H. Shafer, has granted the application of the Halifax Longshoremen's Association, Local 269 with respect to sections 18 and 34 of the Code. The Board, however, makes no finding with respect to the application pursuant to section 92 of the Code which was not pursued at the hearing.*

*The Board has found that by unloading the vessel Sanderling as it did on September 9, 1994, the respondent M&M Manufacturing Limited or M&M Fabricators, as the case may be, has extended itself into the longshoring industry as it exists in the Port of Halifax and that the employees who do such work are included in the geographical longshoring bargaining unit represented by the applicant.*

*Considering, however, that the respondent may change its decision to do such work in the future, the Board will not issue any formal order or declaration at this time. The Board appoints Mr. John Vines to meet with the parties to settle this matter and the Board retains jurisdiction over these matters and anything arising therefrom.*

*Detailed reasons for this decision will be forwarded to the parties early in the new year.*

*Yours very truly,  
(signed)  
G. Legault  
Director General, Operations  
(Chief Registrar)"*

## II

In a joint venture with other companies, M&M Manufacturing secured a contract to construct mechanical outfit modules for the gravity brace structure intended for the Hibernia platform. This large construction project was carried out at a work site at the common user dock in Dartmouth, Nova Scotia, located on 1 Atlantic Street. The dock owned by the Nova Scotia Department of Development was leased by M&M Fabricators, the company formed to perform the contract.

Once constructed these modules were to be loaded upon barges and welded thereon at the common user dock by M&M personnel. The ILA advisedly abandoned that part of its application which dealt with the loading of these modules on the barges.

M&M is in the business of manufacturing and fabricating products. This has been the prime nature of the work carried out by M&M employees. However, the employees did assist on five separate occasions in unloading ships of materials intended for the Hibernia project.

A 33-tonne ballast tank fabricated in Newfoundland was to be sent to M&M for final completion. Newfoundland Drydocks made the arrangements to have the tank sent to Nova Scotia by an ocean-going vessel. The Sanderling, a ship owned by Oceanex, was used to transport the tank. It is under contract to Halterm and mainly transports heavy trailers and containers.

The Sanderling was to dock at Halterm to unload goods. There were two possibilities: (1) unload the tank here onto another vessel or barge and transport it to M&M's work site; and (2) take the Sanderling over to the work site and unload the tank directly off the ship. The second option was chosen.

Dave Richard, the assistant project manager for M&M, assumed that they would arrange for cranes to offload the tank, while Oceanex would be responsible for the crew performing the offloading work.

However, when the Sanderling arrived at the M&M work site, it was M&M employees who tied up the ship. They proceeded to unload the tank and do the blocking of the tank when it arrived on shore. When the work on the tank was completed, the tank was loaded back on the ship. The lines of the ship were then let go.

### III

Counsel for the ILA argued that while M&M's actions may appear insignificant, they have very serious ramifications. He stated that the unique purpose of section 34 of the Canada Labour Code is to ensure that employees who come into the industry, be it for a brief period of time, are not permitted to escape the responsibilities that rest on the other employees who work in the industry. The intention of the port-wide certification is stability in the industry. Persons who perform longshoring work are covered by the collective agreement. Parliament has decided one employer is to have one bargaining agent and one collective agreement.

Counsel for the ILA further maintained that the loading and unloading of cargo to and from commercial vessels in the Port of Halifax is longshoring work carried on by ILA 269. M&M may not have intended to get into the longshoring business, but by its actions, it did.

Counsel for M&M argued that its primary business is manufacturing. It is not engaged in longshoring. The unloading of vessels at the dock which is the work site is part and parcel of the manufacturing process. What must be examined is the nature of the undertaking. M&M is not involved in the commercial transportation business.



The Board granted intervenor status to the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 73. This union represents M&M employees.

Counsel for this union asked the Board to examine the nature of the business. M&M is not a stevedoring company, and just because \$400.00 worth of work was done does not make it so. The work being done was insignificant at best. The operations of M&M must be examined as a going concern. M&M did not deliberately intend to get into the stevedoring business.

#### IV

Section 34 of the Code reads as follows:

*"34. (1) Where employees are employed in*

*(a) the long-shoring industry, or*

*(b) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board, the Board may determine that the employees of two or more employers in such an industry in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.*

*(2) No recommendation under paragraph (1)(b) shall be made by the Board unless, on inquiry, it is satisfied that the employers engaged in an industry in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.*

*(3) Where the Board, pursuant to subsection (1), certifies a trade union as the bargaining agent for a bargaining unit, the Board shall, by order,*

*(a) require the employers of the employees in the bargaining unit*

*(i) to jointly choose a representative, and*

*(ii) to inform the Board of their choice within the time period specified by the Board; and*

*(b) appoint the representative so chosen as the employer representative for those employers.*

*(4) Where the employers fail to comply with an order made under paragraph (3)(a), the Board shall, after affording to the employers a reasonable opportunity to make representations, by order, appoint an employer representative of its own choosing.*

*(5) An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.*

*(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.*

*(7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative."*

Section 34 of the Code applies to the longshoring industry, although the Board does have the power to recommend its extension to other industries. The section is unique in that it grants the Board power to join together, for the purposes of collective bargaining, independent and unrelated federal works, undertakings, or businesses.

Much has been written by the Board on the purpose and intent of section 34. See Maritime Employers' Association (1981), 45 di 314 (CLRB no. 346); Murray Bay Marine Terminal Inc. (1981), 46 di 55 (CLRB no. 352); Murray Bay Marine

Terminal Inc. (1983), 50 di 163 (CLRB no. 401); St. John's Shipping Association et al. (1983), 53 di 114; 3 CLRBR (NS) 314; and 83 CLLC 16,039 (CLRB no. 421); W.S. Anderson Co. Ltd. et al. (1984), 55 di 105; and 84 CLLC 16,023 (CLRB no. 454); Maritime Employers' Association (1984), 56 di 162 (CLRB no. 470); Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642); Maritime Employers' Association (1987), 71 di 77 (CLRB no. 648); and Halifax Offshore Terminal Services Limited et al. (1987), 71 di 157 (CLRB no. 651); Halifax Grain Elevator Limited (1989), 76 di 157 (CLRB no. 725); and Maritime Employers' Association et al. (1991), 84 di 161 (CLRB no. 857).

In Halifax Grain Elevator Limited, *supra*, the Board said the following about the collective bargaining regime that is created when section 34 is involved:

*"Notwithstanding how one describes this system of collective bargaining, be it accreditation, sector bargaining or whatever, this is the type of collective bargaining regime that is created when section 34 of the Code is invoked. With the joining together of all the employers in the longshoring industry who, from time to time use the available labour pool at a port, collective bargaining strengths are balanced and many of the frictions of multiple bargaining are eliminated. Both sides are theoretically forced to take cognizance of one overriding factor - the economic viability and well-being of the port. By bargaining a single collective agreement through an agent, all of the employers in the industry share the costs and the quid pro quo for the employees is the opportunity for steady employment with reasonable returns. This goes a long way to encouraging and maintaining interest in being part of a stable, experienced workforce which is capable of meeting the fluctuating demands of the employers.*

*In this industrial relations scenario there is no room for free-loaders, everyone who hires longshoremen must do so through the system and share in the costs. This is one of the basic reasons why the Board's certification orders are generic in the terms of the bargaining unit. As each longshoring enterprise appears on the scene, its employees are caught by the certification order and the*

*employer becomes bound by the collective agreement covering the port. This aspect of the intended scope of the bargaining units in geographic certification orders under section 34 was discussed in Halifax Offshore Terminal Services Limited et al., supra:*

*'The only issue left was the actual wording of the bargaining unit in the certification order. This issue was resolved after the Board heard submissions on this topic from the MEA and the applicant. It was decided that it was in the best interest of industrial peace and harmonious labour relations at the Port of Halifax for a generic bargaining unit to be described in a geographic certification order. This would ensure that all of the longshoring companies presently at the Port would continue to participate in collective bargaining and it would also cover the eventuality that new companies came in or that existing companies moved out. A generic certification order would eliminate future proceedings before the Board each time such a change occurs. ...'*

*(page 175; emphasis added)"*

(pages 164-165)

## V

What the Board must determine is whether or not M&M, by tying up, loading and unloading ships, could be considered as having extended itself into the longshoring business.

Not all handling and storage of goods at a dock site are necessarily part of the longshoring industry referred to in section 34 of the Code. Loading and unloading of vessels is only brought into federal jurisdiction if the operation is an integral part of maritime transportation. See Halifax Offshore Terminal Services Limited et al., supra.

If M&M employees were involved in transporting their own goods and equipment to or from the work site even if across provincial boundaries, hauling these goods would not constitute interprovincial transportation within the scope of the Code. Many



companies haul their own goods across provincial boundaries every day yet remain within provincial jurisdiction.

The ongoing business of M&M Manufacturing as well as M&M Fabricators is just that: manufacturing and fabricating. Employees who perform this type of work normally come under the constitutional jurisdiction of the province where the activity takes place.

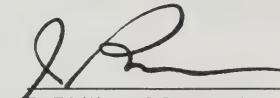
However, in the case of the unloading and loading of the Sanderling, we are dealing with the marine transportation of goods in the true commercial sense. The vessel, owned by a company independent of M&M, carried a variety of commercial goods, and had contracts to do so. The ballast tank that was carried by the vessel was not owned by M&M. The unloading of goods from the ship at other dock sites in the Halifax harbour was performed by members of the ILA 269.

M&M, in loading and unloading the tank in question, has for the purposes of section 34 of the Code extended itself into the longshoring industry. See Halifax Grain Elevator Limited, *supra*. In the geographical area of the Port of Halifax, any loading or unloading of goods from commercial vessels, even if the said goods are owned by or for use in the operation of the consignee, is longshoring and must be done pursuant to the terms of the Board's geographical certification order.

While the work performed by M&M could be considered inadvertent and sporadic, it is not something that can be permitted. To do so would allow this type of incident to occur on a regular basis and have a detrimental effect on the movement of goods at the port. This would undermine the collective bargaining system at the port, invite labour relations unrest, and defeat the purpose of section 34.

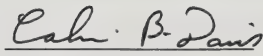
This decision only intends to cover the work done by M&M that is considered part of the longshoring industry. This means that the employer would have another

bargaining agent as well as the one it presently has. However, M&M stated that it did not wish to be engaged in the longshoring business. Therefore, the Board will not issue any formal order at this time and appoints Mr. John Vines to meet with the parties in an attempt to settle the matter. As the section 92 application was not pursued at the hearing, the panel dismisses this application.




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J. Philippe Morneau  
Vice-Chair



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Calvin B. Davis  
Member



---

Patrick H. Shafer  
Member

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## Summary

United Steelworkers of America, *applicant*,  
and Cominco Ltd., *employer*.

Board File: 555-4053  
CLRB/CCRT Decision no. 1204  
February 17, 1997

## Résumé

Métallurgistes unis d'Amérique, *requérant*, et  
Cominco Ltd., *employeur*.

Dossier du Conseil: 555-4053  
CLRB/CCRT Décision n° 1204  
le 17 février 1997

In May 1996, the union filed an application for certification, pursuant to section 24 of the Code, for a unit of employees at the Polaris minesite. Cominco Ltd., the employer, operates the Polaris mine which is situated approximately 1000 miles north of Yellowknife. Due to the harsh climate, the employees there live and work in close quarters where privacy is at a premium.

The employer initially argued that the unit applied for was inappropriate because it did not include employees on determinate-term contracts. It further argued that the Board should order a vote because the close quarters made the employees highly susceptible to undue influence from the union. According to the employer, a failure to order a vote in these circumstances would constitute a violation of sections 2(b), 2(d), 7 and 15 of the Charter.

The Board's mandate is to determine whether the unit, as applied for, is an appropriate one for the purposes of collective bargaining. The indeterminate-term employees formed the backbone of Cominco's operations at Polaris and shared not only a community of interest

En mai 1996, le syndicat a présenté, conformément à l'article 24 du Code, une demande d'accréditation à l'égard d'une unité composée d'employés de la mine Polaris. Cominco Ltd., l'employeur, exploite cette mine qui est située à environ 1000 milles au nord de Yellowknife. Étant donné la rigueur du climat dans cette région, les employés vivent et travaillent dans des quartiers exigus où l'intimité se fait rare.

L'employeur a d'abord prétendu que l'unité visée par la demande n'était pas appropriée parce qu'elle n'incluait pas les employés embauchés en vertu de contrats de durée déterminée. Il a aussi soutenu que le Conseil devait ordonner un scrutin parce que, en raison de l'exiguïté des quartiers où les employés vivent, ceux-ci sont très vulnérables à l'influence induite du syndicat. Selon l'employeur, le défaut d'ordonner un scrutin dans ces circonstances constituerait une infraction aux alinéas 2b) et 2d) ainsi qu'aux articles 7 et 15 de la Charte.

Le mandat du Conseil consiste à établir si l'unité visée par la demande est habile à négocier collectivement. Les employés nommés pour une période indéterminée constituent la base de l'exploitation minière de Cominco à Polaris et ils partagent non

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employment relationship than the determinate-term employees. In fact, it was apparent that the determinate-term employees had no interest in collective bargaining at the present time. Including the determinate term employees would therefore likely have had the effect of depriving the indeterminate-term employees of a meaningful opportunity to bargain collectively. The Board indicated that it would not frustrate a first attempt at unionization by permanent full-time employees by including in the unit employees with a lesser interest in the employment relationship as reflected here.

In the circumstances the Board directed that a unit of indeterminate-term employees was therefore appropriate for the purposes of collective bargaining.

The Board further found that the employer's arguments in support of its request for a vote, in fact went to the issue of employee wishes and that the employer therefore had no standing to advance them. That determination notwithstanding, the Board indicated that the employer's request fails on the merits as well. Employees' wishes, according to the Board's usual practice, should be determined as of the date of the certification application. This longstanding practice does not constitute a violation of the Charter.

The Board also addressed the question regarding the standing of individual employees in Board proceedings. In response to requests by Cominco employees to be apprised of the status of the proceedings in this matter, the Board observed that individual employees do not have an automatic right to participate in certification proceedings as parties. In order to do so, they must file, in a timely fashion,

aussi un plus grand attachement à la relation de travail que les employés nommés pour une période déterminée. En fait, il appert que les employés nommés pour une période déterminée ne sont pas intéressés à la négociation collective. Le fait d'inclure ces employés priverait donc vraisemblablement les employés nommés pour une période indéterminée d'une occasion véritable de négocier collectivement. Le Conseil a déclaré qu'il ne mettra pas en échec la première tentative de syndicalisation des employés permanents à temps plein, en incluant dans l'unité des employés manifestant un intérêt moindre pour la relation de travail, comme c'est le cas ici.

Dans les circonstances, le Conseil a statué qu'une unité composée des employés nommés pour une période indéterminée était donc habile à négocier collectivement.

Le Conseil a en outre conclu que les arguments avancés par l'employeur pour étayer sa demande de tenue d'un scrutin portaient dans les faits sur la volonté des employés et que l'employeur n'était pas habilité à avancer des arguments de cette nature. Nonobstant cette conclusion, le Conseil a déclaré que la demande de l'employeur devait être rejetée sur le fond. Conformément à la pratique habituelle du Conseil, la volonté des employés doit être établie à la date de la demande d'accréditation. Cette pratique de longue date ne constitue pas une violation de la Charte.

Le Conseil s'est aussi penché sur la question du statut des employés, à titre individuel, dans le cadre des procédures engagées devant le Conseil. En réponse aux demandes formulées par des employés de Cominco d'être informés de l'état des présentes procédures, le Conseil a rappelé qu'à titre individuel, les employés ne jouissent pas systématiquement du droit de participer aux procédures d'accréditation en

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an application for intervenor status under section 12 of the Board's Regulations.

qualité de partie. Pour devenir partie à une telle procédure, un employé doit présenter dans les délais prévus une demande en vue d'obtenir le statut d'intervenant conformément à l'article 12 du Règlement du Conseil.



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Relations du  
Travail

## Reasons for decision

United Steelworkers of America,

*applicant,*

*and*

Cominco Ltd.,

*employer.*

Board File: 555-4053

CLRB/CCRT Decision no. 1204

February 17, 1997

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair, and Ms. Roza Aronovitch and Mr. David Gourdeau, Members.

These reasons for decision were written by Vice-Chair Richard I. Hornung, Q.C..

### I

On May 6, 1996, the United Steelworkers of America ("union") filed an application for certification pursuant to Section 24 of the Canada Labour Code, seeking to represent the following unit of employees of Cominco Ltd. ("employer"):

*"All employees of Cominco Ltd. at its Polaris operation, Northwest Territories, save and except forepersons and shifters, persons above the rank of forepersons and shifters, casual employees, office clerical and technical employees, surveyors and engineers and engineers operating in a professional capacity."*

Pursuant to its usual practice in certification applications, the Board has determined that an oral hearing is not necessary to resolve the issues raised by the parties (Sedpex Inc. et al. (1985), 63 di 102 (CLRB no. 543)).

The parties filed several submissions with respect to the appropriateness of the bargaining unit and the advisability of holding a representation vote. The Board also received a number of individual employee replies to the application which expressed their wishes. These were collected and forwarded to the Board by Mr. Richard Olivier ("Olivier"), an employee.

On October 15, 1996, the Board wrote to the parties, in reference to representations by the employer that it wished to make further arguments based on the Charter of Rights and Freedoms, and advised them that any further arguments they wished to make must be submitted to the Board within 30 days. This deadline was subsequently extended to November 22, 1996 for the employer and to November 29, 1996 for the union. Thereafter, on November 22 and 27, the Board received letters from counsel for Richard Olivier et al requesting to be apprised of the status of the file and to receive copies of the submissions of the parties.

## II

The employer objects to the certification of the union on two principal grounds: first, that the unit sought is not appropriate because it excludes certain employees; and second, that the particular characteristics of the workplace require that a vote be held in order to determine the true wishes of the employees. To this second argument, the employer has grafted allegations that the failure by the Board to hold a representation vote would constitute a violation of the Canadian Charter of Rights and Freedoms. Finally, the employer argues that five positions should be excluded from the bargaining unit.

In order to deal with the application, it is necessary to briefly examine the nature of the employer's operation and to specifically focus on the nature of the relationship between different classes of employees and the employer.



The Polaris mine is the world's most northerly base-metal mine. It is situated on the southwest shore of Little Cornwallis Island, N.W.T., approximately 1000 miles north of Yellowknife. The nearest community is Resolute, N.W.T., approximately 60 miles to the southeast. The climate there is harsh. Bitter cold and winds, total darkness from November to February, and the threat of attack by polar bears combine to keep employees in close quarters where privacy is at a premium.

The mine produces a zinc and lead concentrate at a constant rate. During the winter months, these products are stored at the facility and, in summer, when the ice melts and ships can navigate the surrounding waters, they are shipped. Exploration and construction are also carried out in the summer. Staffing levels are thus at their peak during the summer months.

All employees work a rotational schedule of, on average, 8 weeks on, 4 weeks off. This schedule may vary in specific instances according to any number of variables, including the class of employee.

There are fundamentally two classes of employees at the mine: those on indeterminate-term contracts; and those on determinate-term contracts. The determinate-term employees, referred to by the employer as "temporary employees", are the principal bone of contention in this application. The employer seeks their inclusion in the proposed bargaining unit, while the union would have them excluded as casual employees.

The principal characteristic of determinate-term employees, as the name implies, is that they are hired to work for a fixed term, apparently of one or more rotations, on the understanding that either party may terminate the employment relationship at the conclusion of the term. There are additional differences between these employees and the indeterminate-term employees at the mine. However, for our purposes, it is unnecessary to canvass them here.

Determinate-term employees are utilized to respond to variations in staffing requirements according to the level of the operations' activity. This arrangement offers an element of flexibility to the employer. In addition, according to the employer's submission, a number of employees, notably those from aboriginal communities in the North, value the flexibility of a less structured work schedule because it permits them to maintain traditional lifestyle activities or follow other pursuits.

The employer argues that these employees are not "casual" employees, pursuant to the Board's jurisprudence, and, therefore, that they should be included in the bargaining unit insofar as they share a community of interest with the indeterminate-term employees.

### III

In general, where a union has filed an application for certification of previously unorganized employees, the Board exercises considerably more latitude in determining the appropriateness of the bargaining unit than it would in the review of an established unit (Alberta Wheat Pool (1991), 86 di 172 (CLRB no. 907), set aside on other grounds (1993), 157 N.R. 91; and 93 CLLC 14,051 (F.C.A.); Purolator Courier Ltd. (1989), 77 di 1 (CLRB no. 730)). In particular, without a compelling reason - which amounts to more than mere administrative inconvenience for the employer - the Board will not frustrate a first attempt at unionization by permanent full-time employees by adding employees with a lesser interest in the employment relationship (Alberta Wheat Pool, *supra*; Canadian Imperial Bank of Commerce (Powell River Branch) (1991), 83 di 197; 15 CLRBR (2d) 86; and 91 CLLC 16,014 (CLRB no. 843); Pacific Western Airlines Ltd. (1984), 56 di 173; 7 CLRBR (NS) 346; and 84 CLLC 16,040 (CLRB no. 471)). This point, as it applies to "casual" employees, was made by the Board in Pacific Western Airlines Ltd., *supra*, at pages 178-79; 351-352; and 14,344-14,345:

*"What of the general community of interest between regular and casual employees? That will, of course, vary from case to case. Where there is a high turnover of casuals, or where there are long intervals between periods of work by casuals, it becomes particularly difficult to see where the community of interest lies. On the other hand, where, despite the irregularity of hours, there is, as here, a certain continuity over time in the employment of casuals, it is much easier to see how there could be a community of interest between regulars and casuals.*

*[...]*

*If casual and regular employees perform the same work, that will generally mean there is at least some community of interest between them. The difference in degree of attachment to the employment relationship, though, calls into question how strong that community of interest really is. The community of interest is therefore rarely so obvious that the only conceivable unit is a unit including both regular and casual employees. It must be remembered that the Board is not called upon to certify the most appropriate unit, but only an appropriate unit. In certain circumstances units including and excluding casuals may both be appropriate.*

## V

*The Board's general policy of excluding casuals is most often applied in the context of an original certification application rather than, as here, a review application. It is in the original certification applications that the Board is particularly concerned about the potential effect of including casuals. As we have said, regular employees have a much greater stake in their employment relationship than do casuals. Our experience is that regular employees are more apt to favour collective bargaining. Especially where the number of casuals is large, or where the overall unit, with or without casuals, is small, the decision whether to include casuals can easily determine whether the unit will be certified. Given the lesser stake for casual employees, and given the fact that Part V of the Canada Labour Code is designed, as evidenced by the preamble, to promote collective bargaining, we do not think it proper that casual employees should be able to prevent regular employees from exercising their rights under the Code. Accordingly, we still adhere to our general policy that a unit excluding casuals is appropriate, although not necessarily the only appropriate unit."* ...

(citations omitted)

The Board's analyses, as above, applies whether the employees in question are characterized as "casual", "temporary", "part-time" or "determinate-term". In Alberta Wheat Pool, supra, for example, both "part-time" and "casual" employees were excluded. In the present case, the indeterminate-term employees make up the backbone of the employer's operations. It is clear that, as a group, they share a greater attachment to the employment relationship than the determinate-term employees. This is so, regardless of the number of times that the employment of an individual determinate-term employee is renewed. In the context of a first application for certification, this fact is sufficient for us to exclude determinate-term employees from the unit, especially where, as here, the inclusion of this group would, in all likelihood, deprive the indeterminate-term employees of a meaningful opportunity to bargain collectively.

The Board is also mindful of the fact that the determinate-term employees have not expressed any inclination to exercise their rights to bargain collectively. Wishes are not generally determinative of the appropriate bargaining structure, but the Board will not ordinarily include casual employees in a unit where they do not wish it (Canadian Imperial Bank of Commerce (Powell River Branch), supra). This policy applies to the determinate-term employees in question here, especially in the context of a first application for certification as set out above.

The Board finds that a unit of indeterminate-term employees is appropriate for collective bargaining. It is not necessary to decide whether or not a unit which included the determinate-term employees would also be appropriate, though the Board notes in passing that, in terms of the employees' attachment to the employment relationship, this group is far from homogeneous. Should these employees decide at a later date to exercise their right to bargain collectively, a rational bargaining structure which includes them will be examined at that time.



#### IV

The thrust of the employer's argument, with respect to its request for a vote, is that the confined physical space at its installation makes its employees possibly subject to undue influence and as such mandates a secret ballot is the only way to determine the "true wishes" of the employees. The employer adds that a failure by the Board to order a vote in these circumstances constitutes a violation of articles 2(b), 2(d), 7, & 15 of the Canadian Charter of Rights and Freedoms.

The employer states that its "sole objective" in requesting an opportunity to address the issue of a vote, "[is] to ensure that each employee has an opportunity to express himself or herself without any influence or coercion." Arguments such as this go to the wishes of the employees and are "none of [an employer's] business" (K.D. Marine Transport Ltd. (1982), 51 di 130 (CLRB no. 400) at pages 144-145); as such, the employer is simply not entitled to demand standing before the Board in order to make the same: (Canada Labour Relations Board v. Transair Limited et al. [1977] 1 S.C.R. 722 at pages 743-744). A similar conclusion ensues with respect to the Employer's Charter argument in this regard. There are no grounds to grant the employer public interest standing to make such arguments when individual employees can intervene and are able to speak for themselves as they have often done in the past. (see Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236; Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607). These reasons alone are sufficient to dispose of, and deny, the employer's request for a vote.

However, this above preliminary aspect notwithstanding, the employer's request would nevertheless fail on the merits as well. We see no reason, in the present case, to depart from the usual practice of determining the wishes of employees as of the date of the application; see Atomic Transportation System Inc. (1994), 94 di 48 (CLRB no. 1064). Beyond supposition, the employer has not questioned the reliability of the membership evidence. In our view, a vote, especially one held some

eight months after the application was filed, rather than operate against undue influence, invites it.

Again, a similar conclusion is reached with regard to the merits of the employer's Charter argument. An employee's freedom of expression is not limited by the card-based majority system: (Sedpex Inc. et al., *supra*; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Irwin Toy Ltd. v. Québec, [1989] 1 S.C.R. 927; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Haig v. Canada (Chief Electoral Officer), [1993] 2 S.C.R. 995); nor is the right to life, liberty or security of the person threatened by it: (Canadian Imperial Bank of Commerce (1986), 65 di 1 (CLRB no. 564), Re Prime et al. and Manitoba Labour Board et al. 3 D.L.R. (4th) 74, Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; Reference Re s.94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486). Moreover, the Board's procedure does not create any discrimination between employees on any ground which is analogous to those set out at section 15(1) of the Charter: (Bernard LeBrun (1994), 94 di 67 (CLRB no. 1066); Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143). Finally, the choice of a bargaining agent is beyond the scope of the guarantee of freedom of association - whether or not it includes the freedom not to associate - envisaged in section 2(d) of the Charter: (Canwest Pacific Television Inc. (CKVU) (1990), 82 di 54; and 91 CLLC 16,005 (CLRB no. 821); Canada Post Corporation (1989), 77 di 111; 4 CLRBR (2d) 291; and 89 CLLC 16,020 (CLRB no. 738); Sedpex Inc. et al., *supra*; Canadian Pacific Limited (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482); Professional Institute of the Public Service of Canada v. The Northwest Territories (Commissioner), [1990] 2 S.C.R. 367; and Lavigne, *supra*).

Accordingly, for the reasons above, the employer's request for a vote is denied.

## V

There remains the issue of five positions which the employer argues should be excluded from the bargaining unit. The union has not replied to the employer's arguments. For this reason the positions of EIT Concentrator, Assayer I & II, Occupational Nurse and Mine Technician are excluded from the proposed bargaining unit and their incumbents are determined to be technical employees according to the language of the bargaining unit description.

Having thus determined the appropriate unit, the Board is satisfied from the evidence on file that, as of the date of application, a majority of the employees in the unit, as applied for, wish to have the trade union represent them as their bargaining agent.

The Board received a petition and a number of individual letters from employees expressing their opposition to unionization as well as others purporting to renounce their membership in the union. However, we are satisfied that none of these letters were signed before the application was filed. As such, the Board attributes little weight to them (Atomic Transportation System Inc., *supra*).

## VI

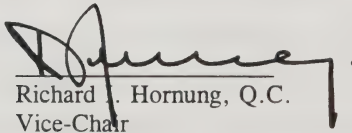
Finally, a procedural issue arose which requires a brief comment. As mentioned above, the Board received letters from counsel for Richard Olivier et al. requesting to be apprised of the status of the file and seeking copies of the submissions of the employer and the union in order to determine whether to make submissions to the Board.

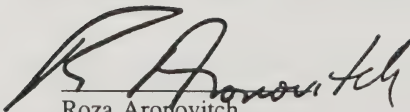
Individual employees have no automatic right to participate in certification proceedings as parties. To do so they must first file an application for intervenor status pursuant to section 12 of the Board's regulations and the same must then be granted by the

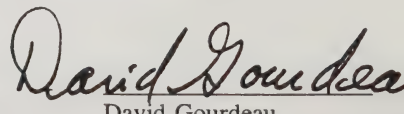
Board (G. Racine et al. (1990), 80 di 1 (CLRB no. 781); Atomic Transportation Systsem Inc., supra). It is not the Board's practice to furnish copies of submissions to individual employees who are not parties to the certification proceeding (Tandet Logistics Inc. (1996), CLRB LD #1579).

That being said, the Board would ordinarily have no objection to simply forwarding the material to counsel for Mr. Olivier were it not for the date of the request. It is apparent that Mr. Olivier consulted counsel as early as May 1996. The current request for information and material were made more than six months after the original application for certification was filed. If Mr. Olivier et al wished to make representations to the Board over and above the expression of their wishes not to be unionized, such representations should have been made in a timely manner pursuant to section 12 of the Board's regulations. The Board is not prepared at this stage of the proceedings to further delay the certification of the union in order to entertain a possible request to intervene which would at present be almost eight months out of time.

For all of the above reasons the Board grants the union's application for certification according to the terms of the attached order.

  
Richard J. Hornung, Q.C.  
Vice-Chair

  
Roza Aronovitch  
Member

  
David Gourdeau  
Member



Canada  
Labour  
Relations  
Board  
  
Conseil  
Canadien des  
Relations du  
Travail

## IN THE MATTER OF THE

Canada Labour Code

- and -

United Steelworkers of America,

applicant union,

- and -

Cominco Ltd.,  
Vancouver, B.C.,

employer.

**WHEREAS** the Canada Labour Relations Board has received an application for certification from the applicant as bargaining agent for a unit of employees of Cominco Ltd., pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations);

**AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, the Board has found the applicant to be a trade union within the meaning of the Code and has determined the unit described hereunder to be appropriate for collective bargaining and is satisfied that a majority of the employees of the employer in the unit wish to have the applicant trade union represent them as their bargaining agent.

**NOW, THEREFORE**, it is ordered by the Canada Labour Relations Board that the United Steelworkers of America, be, and it is hereby certified to be, the bargaining agent for a unit comprising:

*"all indeterminate-term employees of Cominco Ltd. at its Polaris operation, Northwest Territories, excluding forepersons and shifters and those above, casual employees (determinate-term), office, clerical and technical employees, surveyors and engineers and those operating in a professional capacity."*

**ISSUED** at Ottawa, this 17th day of February 1997, by the Canada Labour Relations Board.



Richard I. Hornung, Q.C.  
Vice-Chairman

CONCERNANT LE

Code canadien du travail

- et -

Métallurgistes unis d'Amérique,

syndicat requérant,

- et -

Cominco Ltd.,  
Vancouver (C.-B.),,

employeur.

**ATTENDU QUE** le Conseil canadien des relations du travail a reçu du syndicat requérant une demande d'accréditation à titre d'agent négociateur d'une unité d'employés de Cominco Ltd., en vertu de l'article 24 du Code canadien du travail (Partie I - Relations du travail);

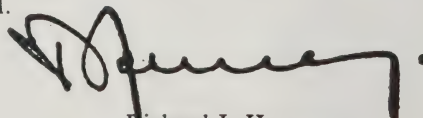
**ET ATTENDU QUE**, après enquête sur la demande et étude des observations des parties en cause, le Conseil a constaté que le requérant est un syndicat au sens où l'entend ledit Code et a déterminé que l'unité décrite ci-après est habile à négocier collectivement et est convaincu que la majorité des employés dudit employeur, faisant partie de l'unité en question, veut que le syndicat requérant les représente à titre d'agent négociateur.

**EN CONSÉQUENCE**, le Conseil canadien des relations du travail ordonne que les Métallurgistes unis d'Amérique soient accrédités, et les accrédite par la présente, agent négociateur d'une unité comprenant:

*«tous les employés de Cominco Ltd. embauchés pour une période indéterminée et travaillant à son exploitation de Polaris, Territoires du Nord-Ouest, à l'exclusion des contremaîtres et des régulateurs ainsi que de ceux qui occupent des postes de niveau supérieur, des employés occasionnels (période déterminée), du personnel de bureau et des services techniques, des géomètres et des ingénieurs, et des professionnels.»*

**DONNÉE** à Ottawa, ce 17<sup>e</sup> jour de février 1997, par le Conseil canadien des relations du travail.



  
Richard I. Hornung, c.r.  
Vice-président

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## Summary

Lawrence Warris, *complainant*, and AT&T  
Canada Long Distance Services Company,  
*respondent*.

Board File: 950-350  
CLRB/CCRT Decision no. 1205  
June 20, 1997

The complainant alleges that the respondent employer violated section 147(a) of the Canada Labour Code by reassigning him to a position of customer services provisioner from that of dispatcher. He viewed this new position as a "demotion" and regarded the employer's action as retribution because he exercised his right of work refusal under the Code.

The Board found that the employer did not breach the Code. The employer identified a need to fill 15 provisioner positions across the country, 9 of which were to be filled in Vancouver. In light of the fact that Mr. Warris' dispatcher position would be eliminated, he was reassigned to the provisioner position. Of the nine people assigned to the provisioner positions in Vancouver, three had more seniority than the complainant. His rate of pay, work location and hours of work remained unchanged.

The Board concluded that the employer had met the onus under section 133(6) and the complaint was accordingly dismissed.

## Résumé

Lawrence Warris, *plaignant*, et AT&T  
Canada Long Distance Services Company,  
*intimée*.

Dossier du Conseil: 950-350  
CLRB/CCRT Décision n° 1205  
le 20 juin 1997

Le plaignant allègue que l'employeur intimé a enfreint l'alinéa 147a) du Code canadien du travail en le mutant d'un poste de répartiteur à un poste de «fournisseur de services» du Service à la clientèle. Le plaignant a perçu cette réaffectation comme une «rétrogradation» et la décision de l'employeur comme une punition pour avoir exercé son droit de refus prévu dans le Code.

Le Conseil a conclu que l'employeur n'a pas enfreint le Code. L'employeur a jugé nécessaire de combler 15 postes de «fournisseur de services» dans le pays, dont 9 à Vancouver. Compte tenu du fait que le poste de répartiteur de M. Warris devait être éliminé, celui-ci a été réaffecté à l'un des postes en question. Des neuf personnes ainsi affectées à Vancouver, trois comptaient plus d'ancienneté que le plaignant. De plus, son taux de rémunération, son lieu de travail et ses heures de travail sont demeurés inchangés.

Le Conseil a jugé que l'employeur s'était déchargé du fardeau de la preuve qui lui incombait en vertu du paragraphe 133(6) et la plainte a donc été rejetée.

SEP 25 1997

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## Reasons for decision

Lawrence Warris,

*complainant,*

*and*

AT&T Canada Long Distance Services  
Company,

*respondent.*

Board File: 950-350  
CLRB/CCRT Decision no. 1205  
June 20, 1997

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The Board was composed of Mr. Richard I. Hornung, Q.C., Vice-Chair.

### Appearances:

Mr. Lawrence Warris, for himself;

Mr. Steven J. McCormack, for AT&T.

### I

On October 3, 1996, Mr. Lawrence Warris (Warris) filed a complaint with the Board against AT&T Canada Long Distance Services Company (AT&T) pursuant to section 133 of the Canada Labour Code alleging that the respondent violated section 147(a) by re-assigning him to the position of Customer Services Provisioner from that of Dispatcher because he exercised his right of work refusal under the Code.

## II

On August 8, 1996, Warris refused to work due to a concern over his exposure to fibreglass dust. His refusal to work was investigated on August 9, 1996, by a Safety Officer from Labour Canada who, on August 14, 1996, delivered a report indicating that no danger existed which justified the work refusal.

On October 4, 1996, Warris was re-assigned to a temporary Provisioner position. However, his rate of pay, work location and hours of work remained unchanged. According to Warris the Provisioner position to which he was re-assigned was a clerical type of position that did not utilize his qualifications as a technician. Nor, for that matter, did it provide him with perks of a car or parking space which he enjoyed in his position as a dispatcher. He believed that the Employer's action in re-assigning him to the position of Provisioner was taken as retribution for him having exercised his right of work refusal under the Code. When taken with the fact that he was an employee of 17 years, the re-assignment to this clerical type position has, according to Warris, left him - and his fellow employees - with the impression that he was effectively "demoted" because he exercised his right of work refusal under the Code.

Notwithstanding his testimony with respect to the above, Warris nevertheless testified that had he "liked the job that he was presently doing (i.e. Provisioner) he would not be complaining" in the present case.

## III

The Employer's explanation paints an entirely different picture. The evidence disclosed that in July 1996 the Employer identified a need to fill 15 additional Customer Service Provisioner positions across the country. Nine of those 15 Provisioner positions were to be filled at the Vancouver office. It was the responsibility of Mr. George Wicks, the District Operations Manager for British Columbia, to staff the 9 B.C. positions. To complete this task Wicks enquired of his

various managers which individuals would be available for the new Provisioner positions. At a meeting with his managers, various employee's names were suggested. Mr. Kevin Schonhofer, the Area Operations Manager for British Columbia, identified three people who worked under his direction for the Provisioner positions. He testified that he proposed Warris for the position in order to accommodate Warris' physical limitations - as well as his skills - and also to provide a position for him in light of the fact that the dispatcher position, which he was currently filling, would be eliminated. In point of fact, at the time of the hearing, the dispatcher position which Warris had previously filled at Vancouver was being conducted out of Montreal. Schonhofer testified that he never considered Warris' Safety complaint in his decision-making process to re-assign him to the new position. With respect to the seniority argument raised by Warris, Schonhofer provided evidence that of the 9 people assigned to the Provisioner job in Vancouver, 3 had more seniority than Warris.

There is no dispute that the re-assignment of work done with respect to Mr. Warris and the other 8 employees at the Vancouver Division were done within the confines of the provisions of the collective agreement under which they are covered. No grievance was filed by the union with respect to Warris' re-assignment or that of any of the other 8 employees.

#### IV

The relevant provisions of the Code are as follows:

*"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that*

*...*

*(b) a condition exists in any place that constitutes a danger to the employee,*

...

*the employee may refuse to use or operate the machine or thing or to work in that place.*

...

*(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that*

*(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or*

*(b) a condition continues to exist in the place that constitutes a danger to the employee, the employee may continue to refuse to use or operate the machine or thing or to work in that place.*

...

\* \* \* \*

*129.(1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.*

\* \* \* \*

*133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

...



*(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

\* \* \* \*

*147. No employer shall*

*(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee*

*...*

*(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part;"*

## V

The optimal consideration in matters such as the present is the determination of whether or not the action taken by an employer, which is alleged to be in breach of section 133, was taken, in the words of section 147:

*".. against an employee because that employee ... has acted in accordance with this Part or has sought the enforcement of any provisions of this Part."*

In the present case the issue is distilled to the question of whether - notwithstanding its ostensible explanation - the decision to assign Warris to the Provisioner's position

was taken, by the Employer, because Warris exercised his right to refuse to work pursuant to section 128 of the Code.

## VI

In my view, the evidence is clear that the Employer's re-assignment of Warris to the Provisioner position was made in conjunction with a larger-scale decision to transfer the Dispatcher's position to Montreal and to re-assign an appropriate number of employees to the Provisioner positions in Vancouver. Warris was at the time a Dispatcher. Insofar as his job would disappear, it became apparent to his supervisors that an inevitable re-assignment would be in his interest. In this respect it must be remembered that, notwithstanding his re-assignment, Warris' rate of pay, work location and hours of work remained unchanged. The Employer's failure to provide parking privileges were consistent and concomitant with the change in Warris' position. Other than Warris' personal interpretation on the effects of his re-assignment, it cannot be said that the effects of the same were punitive, or even that the Employer intended the same.

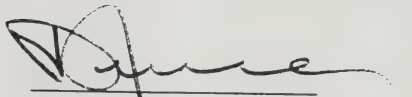
Nor, for that matter, does the evidence disclose any indication that the Employer implemented the expansion of the Provisioner positions, or in fact re-assigned Warris to one of those positions, in retribution for or as a consequence of Warris' refusal to work pursuant to section 128 of the Code.

Finally, it is significant that in his testimony Warris himself stated unequivocally that if he "liked the job that he was presently doing" he would not have brought the present complaint. This, it seems to me, is inconsistent with the bringing of the complaint itself. The protection which sections 133 and 147 afford are designed to ensure that adverse action is not taken against an employee, by an employer, because of the exercise of that employee's rights under section 128 of the Code. The laying of a complaint against an employer should not depend on whether an employee prefers

the position to which he is assigned. In the circumstances, the fact that Warris indicated he would not have brought the present complaint if he "liked" the position to which he was assigned, speaks volumes.

In my view the evidence adduced is convincing that the Employer's actions in re-assigning Warris to the Provisioner position was not linked in any way to Warris' work refusal on August 8, 1996, or to the fact that Warris acted in accordance with section 128.

In the circumstances, the Employer has met the burden imposed on it pursuant to section 133(6). The complaint is dismissed.



Richard I. Hornung, Q.C.  
Vice-Chair





# information

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## Summary

VIA Rail Canada Inc., *applicant*, United Transportation Union and Brotherhood of Locomotive Engineers, *respondents*, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *interested party*, and Canadian National Railway Company, *intervenor*.

Board File: 530-2634  
CLRB/CCRT Decision no. 1206  
September 22, 1997

Application pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) seeking a review of certain certification orders, for the purpose of consolidating the bargaining units currently in existence in respect of VIA's "running trade" employees. This application affects two bargaining units, the "locomotive engineers" unit and the "conductors" unit. The applicant indicated its intention to abolish the two current classifications of locomotive engineer and conductor, and to create a new classification of "operating engineer".

The Board had to determine whether the application should be granted and the ballots of the vote ordered to protect the employees' rights pursuant to section 16(i) ought to be counted, and whether the Board should issue a revised certificate having regard to the outcome of the vote.

The Board concluded that the ballots should be counted and that the application for review

## Résumé

VIA Rail Canada Inc., *requérante*, Travailleurs unis du transport et Fraternité des ingénieurs de locomotive, *intimés*, Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada), *partie intéressée*, et Compagnie des chemins de fer nationaux du Canada, *intervenante*.

Dossier du Conseil: 530-2634  
CLRB/CCRT Décision n° 1206  
le 22 septembre 1997

Demande présentée en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) en vue de faire modifier certaines ordonnances d'accréditation, afin de regrouper les unités de négociation actuellement accréditées à l'égard du «personnel itinérant» de VIA. La présente demande vise deux unités de négociation, soit l'unité des «mécaniciens de locomotive» et l'unité des «chefs de train». La requérante a déclaré son intention d'abolir les deux classifications actuelles de mécanicien de locomotive et de chef de train, et de créer la nouvelle classification de «mécanicien d'exploitation».

Le Conseil devait déterminer si la demande devait être agréée et si les bulletins recueillis lors du scrutin ordonné pour protéger les droits des employés aux termes de l'alinéa 16i) devaient être comptés, et si le Conseil devait délivrer un certificat révisé compte tenu du résultat du scrutin.

Le Conseil conclut que les bulletins devaient être comptés et que la demande de révision

should be granted. Although the employer has not yet actually implemented its proposed change, the Board found, based on the evidence adduced that this outcome is a most likely one and that, were the employer to implement the change without affected employees being offered an opportunity to be included in the bargaining unit and participate in selecting the bargaining agent which would represent them, labour relations chaos would result.

Furthermore, even without the situation of a single running trades classification, the Board has held, with respect to the other major railroad operations in Canada, that a single bargaining unit for running trades employees is appropriate.

The Board further noted that although it was not necessary at this time to determine in final form the unit of employees appropriate for collective bargaining, it was clear that one unit of running trades employees (of "operating engineers") combining the two bargaining units now in existence will be appropriate.

The Board directed the Returning Officer to proceed with the counting of ballots cast in the matter and to report to the Board.

devrait être agréée. Même si l'employeur n'a pas encore mis en oeuvre le changement proposé, le Conseil conclut que, selon la preuve produite, le résultat est des plus probables et que, si l'employeur devait mettre en oeuvre la modification envisagée sans que les employés touchés n'aient par ailleurs la possibilité d'être inclus dans l'unité de négociation et de participer au choix de leur agent négociateur, les relations de travail seraient gravement perturbées.

En outre, même en l'absence d'une classification unique pour le personnel itinérant, le Conseil a jugé, à l'égard des autres grandes entreprises ferroviaires au Canada, qu'une seule et même unité pour le personnel itinérant est habile à négocier.

Le Conseil souligne également que bien que ce soit pas nécessaire pour le moment de définir de façon définitive l'unité habile à négocier collectivement, il est manifeste qu'une unité composée du personnel itinérant (des «mécaniciens d'exploitation») regroupant les membres de deux unités actuelle serait habile à négocier.

Le Conseil enjoint au directeur du scrutin de procéder au dépouillement des bulletins de vote et d'en faire rapport au Conseil.

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## Reasons for decision

VIA Rail Canada Inc.,

*applicant,*

*and*

United Transportation Union and Brotherhood  
of Locomotive Engineers,

*respondents,*

*and*

National Automobile, Aerospace,  
Transportation and General Workers Union of  
Canada (CAW-Canada),

*interested party,*

*and*

Canadian National Railway Company,

*intervenor.*

Board File: 530-2634  
CLRB/CCRT Decision no. 1206  
September 22, 1997

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The Board was composed of Mr. J.F.W. Weatherill, Chairman, as well as Mr. Michael Eayrs, and Ms. Véronique Marleau, Members. A hearing was held on July 2, 3, 9, 10, 11, and August 25, 27 and 28, 1997, at Montréal, Quebec.

### Appearances

Ms. Louise Béchamp, assisted by Messrs. Bannon Woods and Ed Houlihan, for VIA Rail Canada Inc.;

Messrs. Harold Caley and Michael Church, assisted by Mr. W.Guy Scarrow, for the United Transportation Union;

Messrs. Jim Shields and John Yach, assisted by Mr. Gilles Hallé, for the Brotherhood of Locomotive Engineers;

Mr. Abe Rosner, for the National Automobile Aerospace Transportation and General Workers Union of Canada (CAW-Canada);

Mr. John Coleman, for the Canadian National Railway Company. (July 2nd only).

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

## I

The applicant, VIA Rail Canada Inc. (VIA), applied pursuant to section 18 of the Canada Labour Code seeking a review of certain certification orders issued by the Board, for the purpose of consolidating the bargaining units currently in existence in respect of its "running trades" employees. This application affects two bargaining units, one of which, the "engineers" unit represented by the Brotherhood of Locomotive Engineers (BLE), is the subject of a certificate issued by this Board on March 8, 1946 (751-312) and on March 13, 1979 (555-900), for locomotive engineers and certain related classifications such as fireman/helper and hostler in the employ of the Canada National Railways Company, to which in respect of this bargaining unit VIA is the successor. VIA is accordingly bound by that certificate and has standing to make this application. The other bargaining unit, the "conductors" unit, is the subject of a certificate issued by this Board on January 20, 1954 (766-415), for service in its Western Region and on January 29, 1954 (766-414), for service in its Atlantic and Central Regions and which, again, is binding on VIA by virtue of the successorship provisions of the Code. The bargaining agent for this unit of employees is the United Transportation Union (UTU). Each bargaining unit is composed essentially of groups of employees working as locomotive engineers and as conductors and trainmen, occupations which, traditionally, have often been included in separate bargaining units.



It may be noted, however, that in two recent decisions, the Board determined, in respect of employees of Canadian National Railways (Canadian National Railways Company (1993), 92 di 109 (CLRB no. 1024), Board order 530-1851/555-3493) and of Canadian Pacific Limited (Canadian Pacific Limited (1993), 92 di 114 (CLRB no. 1025), Board order 530-1849/555-3494), that one unit of "running trades" employees was appropriate for collective bargaining. On those properties, the Canadian Council of Railway Operating Unions (whose constituent trade unions are the BLE and the UTU) holds bargaining rights in respect of such single running trades bargaining units.

The applicant does not argue that the two present bargaining units of running trades employees on its property are not appropriate for collective bargaining. The applicant indicated however its intention to abolish the two current classifications of locomotive engineer and conductor (for ease of explanation, we shall not refer separately to the related classifications which may be found in each unit, and which will also be affected by this change), and to create a new classification of "operating engineer", whose duties will include the present duties of locomotive engineers and most of the present duties of conductors and related classifications. Some (approximately 30%) of the latter duties are intended to be assigned to "on-board services" employees, members of another bargaining unit, represented by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada). The composition of that unit is not directly affected by this application. From a practical standpoint, this contemplated "merger" of classification is likely to result in the loss of some 250 running trades positions and in the creation of some 70 positions in the services positions. At present, while all members of the engineer unit would be qualified to perform the contemplated functions of the combined classification of "operating engineers", it was established that only 5% of members of the conductors unit would be so qualified.

At the hearing, evidence was led as to the justification for the employer's decision to create the new "combined" classification of "operating engineer". It is not, of course,

open to this Board to determine the propriety of such managerial decisions (save to the extent appropriate in cases of alleged unfair labour practice, which is not an issue in this case). If the employer does implement the new job classification -- and it has, pursuant to its collective agreements with both the BLE and the UTU, given "notice of material change" to each union -- then the present bargaining units would be both redundant and anomalous. Both the BLE and UTU bargaining units would be devoid of members, and the "operating engineers", whether individually members of the BLE or of the UTU, would not come within any presently existing bargaining unit. There would be no certified bargaining agent authorized to negotiate a fair and orderly transition from the existing running trade positions to the newly created positions of "operating engineer". If the employer implements the proposed single running trades classification, as it is open to it to do, and as it has announced it will, then clearly all employees in that classification would have a community of interest for collective bargaining purposes, and they would all appropriately be included in the same bargaining unit.

## II

At the hearing on July 3, 1997, the Board, having heard the parties' representations with respect to UTU's request that a representation vote involving the two trade unions be ordered immediately, made the following ruling:

*"While we have been able to do so promptly, we have given careful consideration to the representations of counsel on the question of ordering a vote of potentially affected employees even before a determination is made on the merits of the application itself. There is no question of the Board's power to do so under section 16(i) of the Code. While in many cases of bargaining unit restructuring a vote is not ordered until the new unit is defined, there may be circumstances where it is desirable and appropriate to order a vote even before the new unit, if any, has been formally defined. In our view, this is such a case. Whether or not the employer succeeds in its application, there is no serious doubt that the requested bargaining unit is one which would consist exclusively of running trades employees. The composition of that unit, were it to be*

*established today, would be equal to the combined composition of the two bargaining units now in existence with respect to running trades. There can be few issues of eligibility to vote. There is, moreover, as we remarked earlier, reason to proceed at once to the taking of a vote, even although its result may not be known for some time, if ever. That reason is that the situation in this case appears to us to be one of present and continuing change, and that the opportunity for employees to express their wishes in respect of union representation is one which is in some danger of disappearing for many employees.*

*Accordingly, the Board orders that a representation vote be held of all running trades employees in the employ of the employer as of July 2, 1997 (a date as to which there is no dispute). The Board appoints Jean Gosselin, Senior Labour Relations Officer, to be Returning Officer and to consult with the parties in the usual way in respect of the wording of ballots, the manner of voting, and other matters. The vote is to be as between the Brotherhood of Locomotive Engineers and the United Transportation Union. The Board of course remains seized of any questions which may need to be dealt with by it. The balloting is to be completed by Friday, September 12, 1997. The ballots cast whether by mail or in ballot boxes shall be sealed and not counted except as directed by the Board."*

The parties have participated in the arrangements for such vote, and all eligible ballots have now been received by the Board.

While there were, in general, few problems with respect to questions of entitlement to vote relating to individual circumstances, a more general question arose as to the eligibility of certain persons who, while not actively employed by VIA as of July 2, 1997 (the date of eligibility established by the Board), nevertheless retained certain employment rights, particularly rights of recall to active employment.

At the hearing on August 28, 1997, the Board put the issue this way:

*"The term 'employee' for the purposes of a representation vote, may include both 'active' and 'inactive' employees. 'Active' employees include both those actually at work on the eligibility date, and those not actually at work but having a continuing 'active' employment*

*relationship: persons absent from work due to illness, workers' compensation, leave of absence, vacation and the like. 'Inactive' employees include persons who have been 'active' employees, and who have, by virtue of certain rights -- whether established by a collective agreement, by legislation or otherwise -- a reasonable expectation of return to the status of 'active' employee, so that they have an appropriate and substantial interest in the choice of bargaining agent."*

After hearing further representations of the parties, and having taken time for consideration, the Board made the following ruling:

*"We have considered all of the representations of counsel, and in our view, and we so find, 'employees of the employer' eligible to vote include employees in the active employ of the employer on July 2, 1997, as well as employees who have had rights of recall during the period from July 2, 1996 to July 2, 1997 -- that is, during the preceding one year -- and who retain such rights."*

*According to the lists provided by the employer, this will mean that some ballots which the Board may have received or may yet receive will not be counted, and that a relatively small number of persons will now be entitled to receive ballots and to vote. The parties are requested to meet with the returning officer forthwith in order to determine any questions relating to the revised voting list. The final date for receipt of ballots shall be September 12, 1997."*

The parties did meet with the returning officer, and reached an agreement with respect to voting procedures in respect of persons eligible to vote pursuant to the Board's ruling. The vote has now been completed, and the matter is before the Board for determination and disposition.

### III

The questions now are whether the application for review for the purpose of consolidating the two running trades bargaining units should be granted and the ballots



counted, and whether the Board should issue a revised certificate having regard to the outcome of the vote.

In our view, the ballots should be counted forthwith and the application should be granted. Although it is not necessary at this time to determine in final form the unit of employees appropriate for collective bargaining, it will be clear from what has been said above that, if the employer's proposed changes in classification (in its way of carrying on its operations) are implemented, one unit of running trades employees (of "operating engineers") combining the two bargaining units now in existence will be appropriate.

The Board has the power, under section 18 of the Code, to review the bargaining unit structure of a business, whenever it deems it appropriate (see Cape Breton Development (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661) at pages 93; 233; and 14,031, affirmed by the Federal Court of Appeal in Nova Scotia Nurses Union, DEVCO Local v. Canada (Labour Relations Board), [1990] 3 F.C. 652 (C.A.)). While there is no specific presumption in favour of all employees (or even "all craft employees") bargaining units, the Board has long favoured the larger, more comprehensive unit based on an analysis of certain relevant factors which normally include administrative efficiency and convenience in bargaining; enhancement of lateral mobility of employees; facilitation of a common framework of employment conditions; and increased industrial stability.

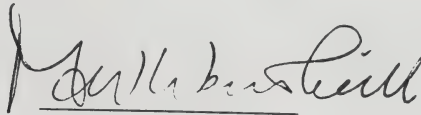
In the final analysis, the question becomes whether the bargaining units' reorganization will foster labour relations peace in facilitating labour relations both for the bargaining agent and for the employer and in promoting the establishment of more realistic, and hence healthier, labour relations between the parties: see in this regard Radio Acadie Ltée CJVA-AM, and Radio de la Baie Ltée, CKLE-FM (1994), 94 di 128 (CLRB no. 1071), at page 151.

While it might be considered that this application is in some sense premature, since the employer has not yet actually implemented its proposed change, it is quite clear from the evidence adduced that this outcome is a most likely one (as we have noted, the employer has, among other things, issued the notices of material change called for by the collective agreements in this respect), and that were the employer to implement the change without affording an opportunity to affected employees to be included in the bargaining unit and to participate in the selection of the bargaining agent that would then represent them (running trades employees), labour relations chaos would result. All parties to this case have, at least implicitly, recognized that fairness and common sense dictate that the problem be addressed now, in order to avoid such chaos. That our granting the employer's application is not simply a speculative or merely an anticipatory determination is clear from the industrial labour relations context to which we referred earlier in these reasons: even without the situation of a single running trades classification, the Board has held, with respect to the other major railroad operations in Canada, that a single bargaining unit for running trades employees is appropriate.

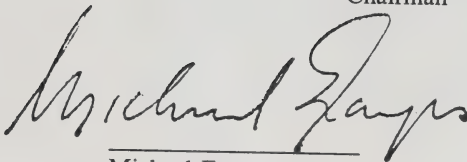
Whatever the outcome of the vote in this matter, the employer, the successful trade union and many of the employees will be placed in difficult positions, and negotiations between the employer and the successful trade union (which will then be representing many employees whose qualifications to perform the functions of the combined classification of "operating engineer" differ) will necessarily be difficult and delicate. It is important to note that the employer has recognized that significant and expensive training -- in particular, training of many conductors to carry out the tasks of engineers -- will be required in order to ensure, in as much as this is possible, that members of both groups of affected employees will be afforded comparable employment opportunities.

Accordingly, the Returning Officer is directed to proceed with the counting of ballots cast in this matter forthwith, and to report to the Board.

Any further submissions respecting the definition of the bargaining unit must be made forthwith, failing which the Board will define the unit in terms which it has used in the recent "running trades" cases referred to above.



J.F.W. Weatherill  
Chairman



Michael Eayrs  
Member



Véronique L. Marleau  
Member





# information

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## Summary

Seafarers' International Union of Canada, *applicant*, Seaway Bulk Carriers Inc., Algoma Central Marine, a Division of Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lakes Bulk Carriers Inc., and Pioneer Shipping Limited, *respondent employers*, and Canadian Maritime Union Local 4401 (CAW), Canadian Merchant Service Guild, *intervenors*.

Board File: 585-537

Canadian Marine Officers' Union, *applicant*, and Algoma Central Marine, a Division of Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lakes Bulk Carriers Inc., Pioneer Shipping Limited, and Seaway Bulk Carriers Inc., *respondent employers*, Canadian Merchant Service Guild, Canadian Maritime Union Local 4401, *intervenors*.

Board File: 585-538

Seafarers' International Union of Canada, Canadian Marine Officers' Union, *applicants*, and ULS Corporation and Seaway Bulk Carriers Inc., *respondent employers*.

Board File: 725-347

Seafarers' International Union of Canada and Canadian Marine Officers' Union, *complainants*, and ULS Corporation,

## Résumé

Syndicat international des marins canadiens, *requérant*, Seaway Bulk Carriers Inc., Algoma Central Marine, une division d'Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lakes Bulk Carriers Inc. et Pioneer Shipping Limited, *employeurs intimés*, ainsi que le Syndicat des marins du Canada, section locale 4401, Guilde de la marine marchande du Canada, *parties intervenantes*.

Dossier du Conseil: 585-537

Syndicat canadien des officiers de marine marchande, *requérant*, ainsi qu'Algoma Central Marine, une division d'Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lakes Bulk Carriers Inc., Pioneer Shipping Limited et Seaway Bulk Carriers Inc., *employeurs intimés*, Guilde de la marine marchande du Canada, Syndicat des marins du Canada, section locale 4401, *parties intervenantes*.

Dossier du Conseil: 585-538

Syndicat international des marins canadiens et Syndicat canadien des officiers de marine marchande, *requérants*, ainsi que ULS Corporation et Seaway Bulk Carriers Inc., *employeurs intimés*.

Dossier du Conseil: 725-347

Syndicat international des marins canadiens et Syndicat canadien des officiers de la marine marchande, *plaignants*, et ULS

22 1997

*respondent, Canadian Merchant Service Guild, Canadian Maritime Union Local 4401, intervenors.*

Board File: 745-4926

CLRB/CCRT Decision no. 1207  
June 16, 1997

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The Board received an application alleging an illegal lockout was taking place. The parties agreed to hold this application in abeyance while a sale of business application was pursued.

The employer's intention was to purchase vessels as assets. They were not interested in buying a business. However, to its surprise, the previous owners of the vessels had entered into contracts that had to be honoured.

The employer maintains that only assets were transferred and that the acquiring of contracts is not tantamount to taking over a business.

The Board finds that a sale of business did occur. More than mere chattels or assets were transferred from the seller to the purchasers. The transfers of the contracts and the vessels ensured that the business carried on by the previous owners was carried on for the same business purposes by the new owners.

*Corporation, employeur intimé, Guilde de la marine marchande du Canada, Syndicat des marins du Canada, section locale 4401, parties intervenantes.*

Dossier du Conseil: 745-4926

CLRB/CCRT Décision n° 1207  
le 16 juin 1997

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Le Conseil a reçu une demande alléguant qu'il y avait lock-out illégal. Les parties ont convenu de mettre cette demande en suspens en attendant qu'une décision concernant une demande de vente d'entreprise soit rendue.

L'employeur avait l'intention d'acheter des navires au titre d'actif. Il n'était pas intéressé à acheter une entreprise. Cependant, à sa surprise, les anciens propriétaires des navires avaient conclu des contrats qui devaient être respectés.

L'employeur soutient que seuls des éléments d'actif ont été cédés et que l'acquisition de contrats n'équivaut pas à une prise de contrôle d'une entreprise.

Le Conseil conclut qu'il y a eu vente d'entreprise. Ce sont plus que de simples biens meubles ou éléments d'actif qui ont été cédés du vendeur aux acheteurs. Les transferts des contrats et des navires faisaient en sorte que l'entreprise dirigée par les anciens propriétaires était maintenant dirigée par les nouveaux propriétaires.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

The Board determined that the bargaining structure consisting of one unit for licensed personnel and one unit for unlicensed personnel is appropriate.

The Board found that a vote is appropriate to determine which union should represent the employees in the two separate units. The vote was ordered even though it was known that the difference in the number of employees in the bargaining units was substantial. While a considerable disproportion of employees belonging to different unions is a factor that must be taken into consideration in deciding whether or not to hold a vote, it is not the determinative or only factor. The Board will also determine if there are other labour relations reasons to hold a vote.

Le Conseil estime que la structure de négociation qui se composait d'une unité de personnel breveté et d'une unité de personnel non breveté est appropriée.

Le Conseil juge qu'il y a lieu de tenir un scrutin afin de déterminer quel syndicat devrait représenter les employés des deux unités distinctes. Un scrutin a donc été ordonné, même si on savait que la différence du nombre d'employés dans les unités de négociation était importante. Bien que l'écart considérable du nombre d'employés appartenant à différents syndicats est un facteur dont on doit tenir compte lorsqu'on décide de tenir ou non un scrutin, ce n'est pas le facteur déterminant ni le seul facteur. Le Conseil déterminera également s'il y a d'autres motifs liés aux relations du travail pour tenir un scrutin.





## Reasons for decision

Seafarers' International Union of Canada,

*applicant,*

*and*

Seaway Bulk Carriers Inc., Algoma Central Marine, a Division of Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lake Bulk Carriers Inc., and Pioneer Shipping Limited,

*respondent employers,*

*and*

Canadian Maritime Union Local 4401 (CAW),  
Canadian Merchant Service Guild,

*intervenors.*

Board File: 585-537

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Canadian Marine Officers' Union,

*applicant,*

*and*

Algoma Central Marine, a Division of Algoma Central Corporation, Canada Steamship Lines Inc., Misener Shipping Limited, ULS Corporation, Great Lake Bulk Carriers Inc., Pioneer Shipping Limited, and Seaway Bulk Carriers Inc.,

*respondent employers.*

The Board was composed of Messrs. J. Philippe Morneau, Vice-Chair, and Calvin B. Davis and Michael Eayrs, Members. Hearings were held on July 12 to 14, 1994, in Montréal, and September 28 and 29, 1994, in Toronto.

#### Appearances

Mr. Joseph Nuss and Mr. Marvin Shahin, counsel, for both the Seafarers' International Union of Canada (SIU) and the Canadian Marine Officers' Union (CMOU); Mr. Roman Gralewicz, President, and Mr. Douglas McMillan, Vice-President, West Coast, and Mr. William Ross, Union Representative (SIU); and Mr. Richard Vézina, President, Mr. Robert Ford, Acting Vice-President, and Mr. Paul E. Dion, Lawyer (CMOU);

Mr. François Côté, accompanied by Mr. Walter Gonyou, President, and Mr. Gary Ward, for the Canadian Maritime Union Local 4401 (CAW);

Mr. John O'Connor and Mr. Jean Grégoire, counsel, accompanied by Mr. Maury R. Sjoquist, National President, and Mr. Earle Simpson, Secretary-Treasurer, for the Canadian Merchant Service Guild (CMSG);

Mr. Ernest Rovet and Mr. John Brooks, counsel, accompanied by Ms. Eva Chudecki, Vice-President Personnel, Mr. Walter G. Davis, Vice-President Operations, and Mr. Clifford Abraham, President and Chief Executive Officer, for ULS Corporation.

These reasons for decision were written by Mr. Calvin B. Davis, Member, pursuant to section 11 of the Code.

#### I

The Seafarers' International Union (SIU) and the Canadian Marine Officers' Union

(CMOU) filed applications alleging that a recent disposition of vessels by Canada Steamship Lines Limited (CSL), Misener Shipping Limited (Misener) and Pioneer Shipping Limited (Pioneer) to Algoma Central Marine, a Division of Algoma Corporation (Algoma), and Upper Lakes Shipping Corporation (ULS) constitutes a sale of business pursuant to section 44 of the Canada Labour Code. The application came about after the parties agreed to hold in abeyance an alleged illegal lockout application filed by the S.I.U and CMOU.

The Board convened a public hearing to determine if in fact a sale of business had occurred. During the hearing, the parties involved in the Algoma purchase reached an agreement. The Board continued to hear evidence on whether or not the ULS purchase constituted a sale of business. After hearing the parties' evidence, the Board, sent its bottom-line decision to the parties on August 29, 1994.

*"Following a hearing held in Montreal on June 12 to 14, 1994, and the representations of the parties up to and including that by Trudel, Nadeau, Lesage, Larivière and Associates of August 24, 1994 and no others subsequent thereto, a panel of the Canada Labour Relations Board comprised of J. Philippe Morneault, Vice-Chairman and Calvin B. Davis and Michael Eayrs, Members, has decided that the transactions, whereby certain vessels operated by GLBC and formerly owned by Misener, CSL and Pioneer became the property of ULS, some of which are to be operated by SBC, constitute a sale of business as defined in section 44 of the Code. The Board also determined that the actual bargaining units in existence at ULS, namely the licensed personnel unit and the unlicensed personnel unit remain the units appropriate for collective bargaining. Furthermore, as the evidence discloses intermingling of employees, the Board is ordering a vote in each of the units (in the case of the unlicensed personnel unit, between the CAW (CBRT) and the SIU, and in the case of the licensed personnel unit, between the CMSG (which was certified following the vote in file 555-3740) and the CMOU to determine which trade union will be the bargaining agent for each of those bargaining units.*

*The voting constituency in each unit is to consist of the current ULS employees in that unit and the last crews, licensed and unlicensed respectively, operating on each of the seven vessels acquired by ULS (formerly operated by GLBC). Mr. Peter Suchanek, Regional Director of the Board's Toronto Office is appointed returning officer in each of the votes and the details of the votes will be communicated to the parties by him.*

*During the period pending the result of these votes, each collective agreement will continue to be binding with respect to the employees respectively covered thereby by virtue of the operation of section 44(c) of the Code. After the vote, only the collective agreement that is binding on the trade union determined by the Board to be the bargaining agent for each bargaining unit will continue to be binding.*

*Detailed reasons for the decision will be forwarded to the parties in due course.*

*Yours very truly,*

*(signed)  
G. Legault  
Director of Operations  
(Chief Registrar) "*

Two other entities, Great Lakes Bulk Carriers (GLBC) and Seaway Bulk Carriers (SBC), also figured in the transactions.

GLBC was a partnership founded in 1991 between CSL, Misener and Pioneer. GLBC operated 15 bulk carriers, 8 on behalf of CSL, 5 on behalf of Misener, and 2 on behalf of Pioneer. It operated this bulk carrier fleet on the Great Lakes, in the St-Lawrence Seaway and in Canadian coastal waters. The vessels transported mainly grain from the Lakehead to eastern destinations, returning west with loads of ore. Once the 15 vessels were sold, GLBC ceased to exist.



GLBC did not own any of the 15 vessels, nor was it a signatory to any collective agreement. However, for expediency sake, the parties referred during the hearing to the ships being sold as GLBC vessels.

Algoma and ULS formed a partnership called Seaway Bulk Carriers (SBC), whose purpose was to market Algoma and ULS to their customers, and ensure that the two companies operated in a logical and economical fashion. SBC employs five individuals. These employees book cargo, deal with customers, invoice the clients and dispatch loads. SBC has no ship-based personnel and neither owns nor operates any of the vessels. Even though Algoma and ULS are involved in the partnership, they are two separate entities with different owners.

After hearing evidence pertaining to SBC, counsel for the SIU and the CMOU agreed that any Board order need not involve SBC.

Even though the market experienced a sharp downturn in 1992, Algoma and ULS decided to pursue in the bulk carrier business. However, some of their own vessels were getting old and costly to maintain. In fact, some were in such poor condition, they would have to be scrapped. Still others were not as large as required and, in the future, additional vessels would be needed.

The companies decided to pursue buying the GLBC vessels. It would cost approximately 15 million dollars to bring the GLBC vessels up to class, while it would cost 25 to 35 million dollars to build a new bulker.

Algoma and ULS agreed that they would each end up with 7 of the 15 available vessels, while the last ship would be scrapped. Some of these vessels could possibly be scrapped along with vessels already operated by the companies.

ULS agreed that in a business transaction, one normally looks at the value of the assets, customer lists, goodwill, viability and the five-year historical financial statements. However, in the particular case of the GLBC vessels, ULS was only

interested in purchasing the vessels as assets. They were not interested in buying a business.

To Upper Lakes Shipping's surprise however, GLBC had entered into contracts with customers. These contracts had to be honoured. This was discovered in the latter days of the discussions to purchase the vessels. The detailed documents of the actual contracts were never received until the closing of the sale, and the contracts were never negotiated by ULS. The gross revenues from the contracts was about 15 million dollars.

The list of contracts were set out in a document called "Assignment of Contracts," signed by the parties. Schedule A lists the contracts.

"

*Schedule A*

*LIST OF CONTRACTS*

- 1. Agreement dated February 10, 1994 between Bethlehem Steel Corp. and Great Lakes Bulk Carriers by its General Partner GLBC Inc. and the related Commission Agreement dated February 10, 1994 between Tornav Shipping Ltd. and Great Lakes Bulk Carriers.*
- 2. Agreement made as of February 26, 1992 between Alcan Aluminum Limited and Great Lakes Bulk Carriers by its General Partner GLBC Inc. as amended by letter agreements dated February 10, 1993 and March 15, 1994.*
- 3. Contract and Affreightment entered into as of April 1, 1993 between ADM Milling Co. and Great Lakes Bulk Carriers Inc.*

4. *Contract of Affreightment made as of April 20, 1993 between Inland Steel Company and GLBC Inc. as amended by a letter agreement dated January 6, 1994.*
5. *Canadian Wheat Board letter dated March 10, 1994 offering to ship 300,000 tonnes of grain during April and May and GLBC Inc.'s acceptance of such offer dated March 11, 1994.*
6. *Charter Agreement dated March 9, 1994 between Mainland Shipping Ltd. as charterer and Great Lakes Bulk Carriers for the carriage of bulk bauxite.*
7. *Charter Agreement dated March 1, 1994 between Fednav Ltd. as charterer and Great Lakes Bulk Carriers for the carriage of sugar.*
8. *Charter Agreement dated March 8, 1994 between Fednav Ltd. as charterer and Great Lakes Bulk Carriers for the carriage of bauxite.*
9. *Storage Agreement between Canamera Foods and GLBC Inc. accepted by Canamera Foods on October 19, 1993 and by GLBC Inc. on October 14, 1993, as amended to extend the date of unload of the s.s. Baie St. Paul to June 30, 1994, for the storage of grain (canola seed and/or soybean) in bulk.*
10. *Storage Agreement between ADM AGRI-IND. Ltd. and GLBC Inc. accepted by ADM AGRI-IND. Ltd. on November 23, 1993 and by GLBC Inc. on October 22, 1993 for the storage of grain soybeans in bulk on board the m.v. David K. Gardiner in the port of Windsor.*
11. *Storage Agreement between ADM AGRI-IND. Ltd. and GLBC Inc. accepted by ADM AGRI-IND. Ltd. on November 23, 1993 and by GLBC on November 18, 1993 for the storage of grain soybeans on board the m.v. Richelieu."*

There were short-term contracts that might not have been renewed, and longer-term contracts, extending to the close of the navigation season and, in a few instances,

extending to future navigation seasons.

ULS maintained that it did not want the contracts as some were losing money. The company only took the contracts because it wanted to purchase the vessels. The vessels acquired were not being used to execute the contracts. Three of their original vessels were doing the work assigned by the contracts.

As far as ULS was concerned, all employees working on GLBC vessels had been terminated as the vessels were no longer in service. Shore-based employees were given termination notices in July 1993. One former GLBC employee who was looking for work had been employed by ULS on one of its original vessels.

At the time of the Board's hearings, no GLBC vessels were being used by ULS. According to ULS, the main reason the ships were tied up was lack of business. Furthermore, the company was concerned about labour problems.

The unlicensed personnel on the original ULS vessels are represented by the Canadian Brotherhood of Railway Transport & General Workers (CBRT), which merged with the Canadian Autoworkers (CAW). This new union is now called the Canadian Maritime Union Local 449 (CAW).

The licensed personnel at ULS consisting of the electrical and engineering officers were also represented by the CBRT. However, during the open period, the Canadian Merchant Service Guild (CMSG) conducted a raid and applied for certification of the unit. Following a vote, the CMSG was certified to represent the licensed employees on ULS ships. By the time the Board issued its bottom-line decision on August 29, 1994, the CBRT had been replaced by the CMSG.



On GLBC ships there were also two bargaining units: the licensed personnel was represented by the Canadian Marine Officers Union (CMOU), which is a local of the SIU; and the unlicensed personnel represented by the SIU.

The bargaining agent representing the employees on Algoma ships was the same bargaining agent that represented the employees on GLBC ships.

## II

The relevant provisions of the Code pertaining to a sale of business are section 44, 45 and 46.

*"44. (1) In this section and sections 45 to 47.1,*

*'business' means any federal work, undertaking or business and any part thereof;*

*'sell', in relation to a business, includes the lease, transfer and other disposition of the business.*

*(2) Subject to subsections 45(1) to (3), where an employer sells his business,*

*(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;*

*(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;*

*(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and*

*(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.*

*45. (1) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, the Board may, on application to it by any trade union affected,*

*(a) determine whether the employees affected by the sale constitute one or more units appropriate for collective bargaining;*

*(b) determine which trade union shall be the bargaining agent for the employees in each such unit; and*

*(c) amend, to the extent the Board considers necessary, any certificate issued to a trade union or the description of a bargaining unit contained in any collective agreement.*

*(2) Where an employer sells his business and his employees are intermingled with employees of the employer to whom the business is sold, a collective agreement that affects the employees in a unit determined to be appropriate for collective bargaining pursuant to subsection (1) that is binding on the trade union determined by the Board to be the bargaining agent for that bargaining unit continues to be binding on that trade union.*

*(3) Either party to a collective agreement referred to in subsection (2) may, at any time after the sixtieth day has elapsed from the date on which the Board disposes of an application made to it under subsection (1), apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.*

*(4) On application being made to it pursuant to subsection (3), the Board shall take into account the extent to which and the fairness with which the provisions of the collective agreement, particularly those dealing with seniority, have been or could be applied to all the employees to whom the collective agreement is applicable.*

*46. Where any question arises under section 44 or 45 as to whether or not a business has been sold or as to the identity of the purchaser of a business, the Board shall determine the question."*

Counsel for ULS argued that only assets (the 15 ships in question) were transferred. Some of the vessels had not even sailed in the previous two years. Acquiring contracts is not tantamount to taking over of a business. Two of the contracts resulted in ULS losing money. They were not viable contracts. The vessels were not purchased because of the contracts.

Counsel for the CAW agreed that no sale had occurred. The assets involved do not contribute to the economic activities. As well, there was a hiatus in the business. Some of the vessels had not sailed in the previous two years. Before this transaction can be considered a sale of business, there must be a functional economic vehicle. None exists in these circumstances.

The Board's policy concerning section 44 and sales of businesses was formulated by the full Board in Terminus Maritime Inc. (1983), 50 di 178; and 83 CLLC 16,029 (CLRB no. 402). In that case, the Board reiterated that the sale of business provisions were enacted essentially to ensure the protection and permanence of bargaining rights. The Board also strongly reaffirmed its intention to interpret section 44 broadly.

The Board, in determining whether there has been a sale of business, adopted an approach whereby it considers the particular characteristics and individuality of each business, having regard to a "dynamic" interpretation of this reality. It is one thing to say that there may have been some form of transfer, but it is another thing to say what took place was the transfer of a "business" within the meaning of section 44. See Logistec Corporation et al. (1986), 67 di 120; 15 CLRB (NS) 338; and 87 CLLC 16,008 (CLRB no. 593).

The employer argued that what was essentially acquired was assets. The Board in Secunda Offshore Incorporated (1986), 67 di 75 (CLRB no. 589), discussed the acquiring of assets by one company from another.

*"... Two principles that can be drawn from these cases that are particularly relevant to this application are that the transfer of a chattel from one company to another or the loss of business to a competitor seldom attracts successor rights under the Code. There must be more than a transfer of an asset or the takeover of work for a sale of business under the Code to have occurred. The major prerequisites are that the business or part thereof of the seller must be taken over by the purchaser. In the transaction there must be a nexus between the seller and the purchaser."*

(page 81; emphasis added)

The Board then explained that what had occurred in the case before it was the transfer of a chattel from a business to another unrelated business and that bargaining rights do not attach to a chattel or an asset such as a piece of equipment. The old adage of "that truck is in our union" has long been dispelled.

However, Mr. Marc Lapointe, Q.C., former Chair of the Canada Labour Relations Board, explained in a subsequent decision the manner in which bargaining rights could attach to a chattel or an asset as follows:

*"But, it could very well happen that the transfer of a sole chattel or sole asset (its sale) could very well trigger the successor provisions in the Code. Bargaining rights could then attach to a chattel or an asset, such as a piece of equipment (here a vessel). In those circumstances, the old adage of 'that truck is in our union' would not have been dispelled."*

*There is a danger for parties to fall into the oversimplification that as long as the sale involved only an asset, there can never be an application of the successor provisions in the Code."*

(ASL Atlantic Searoute Limited (1990), 81 di 80 (CLRB no. 804), page 86)

Further along in the decision, Mr. Lapointe went on to say:



*"The application is therefore dismissed. But at first glance, this could have constituted a case where a business, as far as assets or chattels are concerned, would possess only one asset, a vessel, and that its sale, together with the accompanying transfer of the rest of the components of the business to a buyer, would trigger the application of the successor provisions in the Code. Then, bargaining rights would attach to a piece of equipment, a vessel."*

(page 87)

The Board has, on many occasions and in countless ways, described the factors involved when considering if a sale of business has occurred. These factors include presence or absence of the sale, transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing, or any other obligations to assist the successor. See Culverhouse Foods Limited, [1976] OLRB Rep. Nov. 691, reproduced in Pyramid Marine Services Limited (1988), 75 di 115 (CLRB no. 712). These criteria must not be looked at in isolation but must be considered in the whole context of the sale.

### III

The Board finds that a sale of business did occur. More than mere chattels or assets were transferred from the seller to the purchasers. GLBC's bulk business ceased with the transfer of the vessels and the 11 contracts to the new owners. While some of the vessels purchased by ULS might well be scrapped or replace vessels already in the fleet, ULS had managed to acquire the means by which it could increase its business. The transfer of the 11 contracts and the vessels ensured that the operations of the business carried on by the partners in the GLBC operation were in the hands of ULS, and carried on for the same business purposes.

If it had not been for the industrial unrest that ULS feared could occur, it is quite possible that at least some ULS vessels would have been in operation by the time the public hearing into the sale commenced. While the purchased vessels were idle, the contracts that came with the purchase contributed to an expansion of ULS's overall business. ULS now had the opportunity to expand, because it had the vessels to do so, and one of its prime competitors in the bulk business was no longer operating. This

is a far different situation than merely purchasing an asset from a competitor as occurred in Secunda Offshore Incorporated, supra.

Having found that a sale of business did occur, the Board must then determine how many units are appropriate for collective bargaining.

The Board rejects the SIU's argument that separate units are appropriate for the newly acquired GLBC vessels. The present bargaining structure at ULS, one unit for the licensed personnel and one unit for the unlicensed personnel, is appropriate. The employees of both seller and purchasers perform the exact same work, thus intermingling would occur. The only difference is that they are represented by different bargaining agents with different collective agreements.

The Board found that a vote is appropriate to determine which union should represent the employees in the two separate units. The vote was ordered even though it was known that the difference in the number of employees in the ULS bargaining units and in the GLBC bargaining units was substantial, with ULS having the greater majority of employees. While a considerable disproportion of employees belonging to different unions is a factor that must be taken into consideration in deciding whether or not to hold a vote, it is not the determinative or only factor. See Seaspan International Ltd. (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190).

The Board will also determine if there are other labour relations reasons to hold a vote. It felt that in the circumstances of this particular case, there was good reason to hold a vote. The employees would be able to express their wishes as to which union they wish to have represent them. A vote would clear the air once and for all as to which bargaining agent has the support of the majority of the employees. A vote would bring finality to the matter and leave no doubt in the employees' minds as to which bargaining agent is the true representative of the employees.

A vote is also necessary in these proceedings because of the historical conflict between the parties. It is a known fact that ULS and the SIU had previously had a stormy relationship. ULS made no secret of the fact that it did not wish to have any dealings at all with the SIU. With the vote, the employees would be confident that their decision alone would determine which bargaining agent would represent them.

By the time the vote took place, the CMSG was representing the licensed personnel aboard ULS vessels. It had been successful in a raid application and therefore argued strenuously that it should not be subjected to a further vote such a short time after the raid vote. The Board determined that in everyone's best interest, for the labour relations reasons already given, a vote should be conducted amongst the employees in the CMSG's unit as well.

Once the vote was ordered, it was assumed that it would proceed in its normal manner with the Board's officer and the parties working out the administrative details. However, on September 14, 1994, the Board was advised by letter from counsel for ULS that its client had obtained Canada Wheat Board contracts, which required it to sail three or four GLBC vessels by the first week of October 1994. The employer feared that if it had to operate under two collective agreements, potential confusion, labour instability and industrial relations disarray could occur. The employer urged the Board to modify certain parts of its order which, in the opinion of the employer, could have negative consequences.

The employer was particularly concerned because of the many years of antipathy and acrimony that had existed between it and the SIU. As well, the CBRT and the SIU were traditionally adversaries and at times bitter rivals. The employer felt that it was inconceivable that parties in such fundamental opposition could coexist within the framework of a collective bargaining relationship, even for a brief period. The employer requested that the Board amend its decision and directions to the parties as there were new events that were not known at the time of the hearing.

The Board is well aware of the turbulent relationship between ULS, the SIU and the CBRT. However, it was not persuaded to change its mind; it directed that the parties comply with the order as conveyed on August 29, 1994. This meant that until the vote was completed, GLBC vessels would operate under the SIU and the CMOU collective agreements.

#### IV

The Board also received an application filed by the SIU and the CMOU for an access order pursuant to section 109 of the Code. The Board convened a hearing in this matter, but is pleased to report that the parties were able to settle the matter amicably. As well, an unfair labour practice complaint was received by the Board but it became unnecessary for the Board to proceed with it, as the parties were able to settle matters themselves.

The final chapter occurred when the vote took place and the bargaining agents in place at ULS, namely CAW-Canada and the CMSG, were successful and continued as the representatives for the unlicensed and licensed personnel.


Despite the history of turbulent labour relations that existed between some of the parties, they conducted themselves in the utmost professional manner during the proceedings leading up to the final counting of the vote.



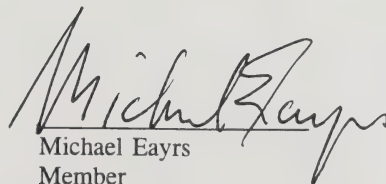
The Board also wishes to recognize the superb job done by its staff during the proceedings. The logistical difficulties involved in holding a vote on 20 ships required enormous amounts of energy and ingenuity. According to the Board's understanding, everything went smoothly and efficiently, a credit to the Board's capable staff.



J. Philippe Morneau  
Vice-Chair



Calvin B. Davis  
Member



Michael Eayrs  
Member



# information

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## Summary

Angelo Mangatal, *complainant*, and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), *respondent*.

Board File: 745-5645  
CLRB/CCRT Decision no. 1208  
July 11, 1997

## Résumé

Angelo Mangatal, *plaignant*, et Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleurs et travailleuses du Canada (TCA-Canada), *intimé*.

Dossier du Conseil: 745-5645  
CLRB/CCRT Décision n° 1208  
le 11 juillet 1997

In March 1995, the Brotherhood of Maintenance of Way Employees (BMWE) were on strike at Canadian Pacific Railway. The CAW supported the BMWE's strike and provided notice to its members not to cross the picket lines set up by the BMWE.

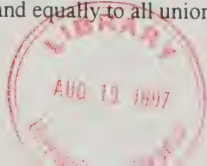
The complainant alleges that the respondent union (CAW) breached section 95(g) by disciplining him in a discriminatory manner because he had crossed the said picket lines. The Board addressed and dismissed the complainant's argument that he had not been adequately advised by the union that the picket line was not to be crossed.

Much of the difficulty encountered by the complainant was due to confusion and delay in processing his charge due to the inconsistent application of the union's newly amended constitution. Notwithstanding this, the laying of the charges and the ultimate determination of penalties were applied consistently and equally to all union members.

En mars 1995, la Fraternité des préposés à l'entretien des voies (FPEV) a débrayé chez Canadien Pacifique Limitée. Le TCA appuyait la grève de la FPEV et a avisé ses membres qu'ils ne devaient pas franchir la ligne de piquetage dressée par la FPEV.

Le plaignant allègue que le syndicat intimé (TCA) a enfreint l'alinéa 95g) en lui imposant une mesure disciplinaire d'une manière discriminatoire parce qu'il avait franchi ladite ligne de piquetage. Le Conseil a examiné et rejeté l'argument du plaignant selon lequel le syndicat ne l'avait pas bien avisé qu'il ne devait pas franchir la ligne de piquetage.

La difficulté qu'a eue le plaignant est en grande partie attribuable à la confusion et au retard à traiter son accusation en raison de l'application irrégulière des statuts nouvellement modifiés du syndicat. Néanmoins, le dépôt d'accusations et la détermination finale des pénalités se sont faits de façon uniforme et équitable pour tous les membres du syndicat.



The Board found that the respondent union did not breach the Code. The complaint is dismissed.

Le Conseil a jugé que le syndicat intimé n'avait pas enfreint le Code. La plainte est rejetée.

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LES MOTIFS DE DÉCISION DU CCRT SONT  
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## Reasons for decision

Angelo Mangatal,

*complainant,*

*and*

National Automobile, Aerospace,  
Transportation and General Workers Union of  
Canada (CAW-Canada),

*respondent.*

Board File: 745-5645

CLRB/CCRT Decision no. 1208

July 11, 1997

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The Board was composed of Vice-Chairs Richard I. Hornung, Q.C., and Suzanne Handman, and Member Patrick H. Shafer.

These reasons for decision were written by Mr. Richard I. Hornung, Q.C., Vice-Chair.

### I

On March 10, 1997, Mr. Angelo Mangatal, the complainant, filed an unfair labour practice complaint against the Union pursuant to section 97(1) of the Canada Labour Code. Mangatal alleges that the Union, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), violated section 95(g) of the Code. Those sections provide as follows:

"95. No trade union or person acting on behalf of a trade union shall

*(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;*

*(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union; "...*

Immediately following the conclusion of the hearing, for reasons which become apparent below, the Board, with the agreement of the parties, provided its decision and indicated that its reasons would follow. This constitutes the Board's reasons for decision.

## II

The relevant facts of the case are essentially not in dispute.

In March of 1995, the Brotherhood of Maintenance of Way Employees (BMWE) staged a strike at Canadian Pacific Railway. The CAW supported the BMWE's strike. As a consequence, any of the CAW members who did not report for work were locked out by the Employer. The CAW provided notice to its members (Exhibit 12) of the lockout and of its policy which directed employees not to cross the BMWE's picket lines. Some employees, including the complainant, nevertheless crossed the picket line to work. After the strike and lockout ended, and the employees returned to work, the CAW filed charges against those members who crossed the picket lines during the labour dispute. Mangatel was one of those charged.

At the time, the administrative process employed by the Union with respect to filing and prosecuting the charges was somewhat confused. This was primarily due to the

fact that the Union amended its Constitution in the summer of 1994. However, the newly printed version - which was in effect at the material time and set out the procedure for prosecuting charges such as the one against Mangatal - was not fully distributed to its locals until July 1995. Accordingly, various locals dealt with their alleged offenders in different fashions; some relied on the provisions of the newly amended 1994 Constitution while others relied on the 1991 Constitution.

As a consequence, when Mangatal was charged in May 1995, he was provided with a "notice of trial" which complied with the provisions of the 1991 Constitution. However, the 1994 Constitution did not provide for the same automatic trial process. In July, following a discussion which he had with Mr. Dennis Cross, the President of Local 101, Mangatal was advised that he would be informed of a trial date. However, at this stage the process appears to have derailed.

Nothing further happened until February 1996 when Mangatal received a letter setting out the particulars of a "new" charge against him relating to the March 1995 strike. Thereafter, in July 1996 he received a request from Mr. Ron Pellerin, CAW's National Representative, requesting that Mangatal provide a statement in defense. Mangatal responded on August 13, 1996 (Exhibit 1.4) but heard nothing further until March 1997. All the while, he continued, according to his evidence, to expect a notice to attend a trial and awaited the same. Notwithstanding that the right of trial that existed under the previous Constitution no longer applied, Mangatal restricted his statement of defence to essentially a "jurisdictional" argument based on timeliness and consequently acted at his peril.

In February 1997 the Union announced its intention to call elections for Local 101. Mangatal submitted his nomination papers. Following this he was advised by both Pellerin and Cross that his nomination would be removed from the list insofar as he was no longer a member in good standing of the Union and that a letter to that effect was on its way. Shortly after March 12, 1997, he received notification (Exhibit 6) from Mr. Basil Hargrove, the Union's National President, that he was was no longer

a member in good standing and consequently could not participate in local Union elections for a period of 3 years. Mangatal appealed this decision as provided for in the Union's Constitution. As well, he filed the present complaint with this Board.

Pellerin testified that it was his responsibility to investigate and report on the charges against Mangatal as well as all other members who were similarly charged. His report in that regard was coincidentally not completed until February 11, 1997 - around the time elections were called - and for various reasons did not go to the President until Pellerin returned from vacation at least 2 weeks after that. Having received Pellerin's report, Hargrove, pursuant to Article 24 of the Union's 1994 Constitution, made the determination which he did. Unlike the provisions of the 1991 Constitution, there was no automatic right of trial contained in the 1994 Constitution for members charged, and no trial preceded the President's determination in this instance. In fact, all of the charges were disposed of by Hargrove in the fashion recommended in Pellerin's report.

### III

Mangatal argued that the lack of timeliness in bringing the charges against him; the delay in proceeding with the same; and the failure to provide a "trial", constituted a breach by the Union of section 97(1) of the Code.

Mangatal advanced a further position which warrants addressing here. He asserted that the Union never specifically told him that he was not to cross the picket lines in question. He contends, citing Beaven et al. v. T.W.U., [1997] 32 CLRBR (2d) 230, that in order for it to proceed with the charges against him as it did, it must be shown that the Union made it clear to its members both that the picket line was to be respected and that serious consequences would follow if it was not. We do not agree.



Leaving aside the fact that Mangatal received the requisite notice (Exhibit 12) and nevertheless subsequently crossed the picket line, we have no hesitation in dismissing that argument outright. Beaven et al., supra was decided on specific facts which therefore do not lend it as precedent in support of or as advocating the proposition suggested in Mangatal's argument. Although there may be circumstances where a union might give mixed signals with respect to the honouring of a picket line - which could mitigate action taken against its members - we do not believe that a longstanding union member can reasonably assert that he is not aware that the crossing of a union picket line is a serious offense which exposes him to the severest penalty which can be imposed by the union.

Often the strength of a union and its ultimate bargaining power depends entirely on its ability to ensure solidarity amongst its members. A union is entitled, within the ambit of its Constitutional provisions, to require compliance of its directives from its members and to enforce the same by prosecuting recalcitrant members. This is so even in circumstances where a union, following its Constitution, elects to take appropriate strike action - and the strike action is subsequently determined by this Board, or another forum, to be illegal.

The consequences of crossing a picket line are by now surely universally understood by union members. There is nothing said by the Board in Beaven et al., supra, which, in itself, can be taken to open the door for those members who choose - often for their own very good reasons - to cross picket lines and avert the consequences of their actions. Members who choose to cross a union's picket line surely must expect that there will be consequences for so doing.

Even if there is an argument that the member was unaware of the union's rules in regard to crossing a picket line - or was otherwise not aware of the serious consequences of the same, and would not have done so but for the union's failure to specifically advise or direct the member in that respect - that argument must be made to the union and adjudicated upon by it in the course of the determination of a charge

taken against the member and determined pursuant to the provisions of the union's Constitution. Except for the very narrow purposes specifically set forth in the Code, as alluded to above, the Board has no role to play in such a factual determination, nor should its decisions be taken to provide the basis for the same.

#### IV

The Union, for its part, argued that the determination of the commission of the offenses in question; the procedure employed in prosecuting the same; and any appeals from convictions, were issues to be resolved within the Union's Constitutional framework and should not be interfered with by the Board.

In light of the fact that the Union's appeal process was to proceed the next day, the Board provided the parties with its determination immediately following the conclusion of the hearing.

#### V

In Mark Conlin (1994), 95 di 145 (CLRB no. 1088), the Board recently reviewed its policy in applications which allege a breach of section 95(f) and (g):

*"The Board's policy in applications which allege a breach of section 95(f) and (g) has been clearly enunciated in a number of cases: James Carbin (492), supra; Ronald Wheadon et al. (1983), 54 di 134; 5 CLRBR (NS) 192; and 84 CLLC 16,004 (CLRB no. 445) upheld by Seafarers' International Union of Canada v. Ronald Wheadon et al. judgement rendered from the bench, nos. A-1777-83 and A-1778-83, June 5, 1985 (F.C.A.); and Paul Horsley et al. (861), supra. In reviewing its policy, the Board noted in Paul Horsley et al. (861), supra:*

*...Clearly the mischief sought to be caught by these sections is discriminatory abuse of internal disciplinary powers. The Board is not to sit in appeal from decisions made by trade union*

disciplinary bodies. This was made clear by the Board in Ronald Wheadon et al. (1983), 54 di 134; 5 CLRB (NS) 192; and 84 CLC 16,004 (CLRB no. 445), where the Board expressed its view of what its role is in this type of complaint and set out what it expected from trade unions that were responding to complaints under these sections of the Code from their members:

*It should be made very clear that this Board is not an appeal body from internal union discipline. The role of the Board under section 185(g) [now section 95(g)] of the Code is to ensure that discipline standards, which includes the basis for their application, the manner in which they have been applied and the results of their application, are free from discriminatory practices. In performing that task the Board shall not, as stated previously, apply a standard that would negate the informality provided for in the constitutions of some trade unions. What the Board does expect though, are realistic, human and plausible explanations from trade unions for their conduct.*

*(pages 150; 209; and 14,036-14,037; emphasis added)*

*In the same decision, the Board also reviewed the standards it would be applying when dealing with complaints under sections 95(f) and (g). For our purposes here, it is only necessary to zero in on what is meant by 'discriminatory' in the context of these sections [quoting Terry Matus (1980), 37 di 73; [1980] Can LRBR 21; and 80 CLC 16,022 (CLRB no. 211); pages 86; 32; and 588:*

*...this Board endorses the criteria set down by Mr. Innis Christie, then Chairman of the Nova Scotia Labour Relations Board, when he said in Daniel Joseph McCarthy and International Brotherhood of Electrical Workers, [1978] 2 Canadian LRBR 105, at p.108:*

*In our opinion the word 'discriminatory' in this context means the application of membership rules to distinguish between individuals or groups on grounds that are illegal, arbitrary or unreasonable. A distinction is most clearly illegal where it is based on considerations prohibited by the Human Rights Act, S.N.S. 1969, c.11, as amended; a distinction is arbitrary where it is not based on any general rule, policy or rationale; and a distinction may be said to be unreasonable where, although it is made in accordance with a general rule or policy, the rule*

*or policy itself is one that bears no fair and rational relationship with the decision being made. ...*

*(pages 146; 205; and 14,034)*

*Although the above quote refers only to membership rules, the rationale is equally applicable to the standards of discipline referred to in s.95(g).*

*(pages 205; and 144-145; emphasis added)'"*

(pages 152-153)

The Board's role, in cases such as the present, is limited. Its interference, if any, is restricted to circumstances specifically referred to in sections 95(f) and (g). The Board is not mandated to interfere in internal union matters; its authority extends only to ensuring that the terms of the union's Constitution are applied in a manner that is free from discrimination; see: Mark Conlin, *supra*; Paul Horsley et al. (1991), 84 di 201; and 15 CLRBR (2d) 141 (CLRB no. 861) upheld by Canadian Union of Postal Workers v. Paul Horsley et al., no. A-292-91, May 29, 1992 (F.C.A.); James Carbin (1984), 59 di 109; and 85 CLLC 16,013 (CLRB no. 492); Paul Dickinson (1993), 92 di 182; 22 CLRBR (2d) 53; and 93 CLLC 16,062 (CLRB no. 1029); and Claude Pilette v. Syndicat des Postiers du Canada [1991], R.J.Q. 1015 (Que.S.C.).

In our view, it was clear that the charges levied against Mangatal, and the eventual determination of his conviction by the National President, were effected on the same basis and in the same circumstances as all other members who were accused and subsequently determined to be in breach of the Union's policy regarding the crossing of a picket line. The discipline imposed on Mangatal was consistent with, and equal to, that given to each and every other member across Canada who was "convicted" by Hargrove of the offenses in question. Furthermore, it cannot be said that in the circumstances the penalty imposed, for crossing a picket line, was unfair or discriminatory.



VI

Although there was considerable confusion, as discussed above, in the procedures and process which the Union employed in prosecuting the charges, it is nevertheless clear that the determination of guilt and the penalties imposed were applied in an even-handed fashion to all of those members charged. The failure of the Union, in this case, to follow to the letter the procedures established does not vitiate the charges against the complainant. In Jim Saunders (1988), 74 di 165 (CLRB no. 701), the Board made the following observations about its right to interfere in the union's handling of complaints, which fall within its own Constitution, in circumstances where the union did not observe all of the procedural requirements:

*"...The failure of a union to observe fully the terms of its own constitution and rules in the handling of a matter like this is not invariably tantamount to a breach of section 185(f) and (g) [now section 95(f) and (g)]. The Canada Labour Relations Board has no general mandate to supervise or police union observance of constitutions, by-laws and rules of order. There are other forums where non-observance of such may be challenged. The Board's involvement in the internal affairs of a union is quite specific, restricted and specialized and in respect of section 185(f) and (g) it has to do with membership rules or disciplinary standards being applied in a 'discriminatory' manner. Even if the union, in respect of the September 8 incident, did not cross all of the T's or dot all of the I's there is no evidence before the Board to support the view that there was anything 'discriminatory' in the way Mr. Saunders was then treated." ...*

(pages 168-169)

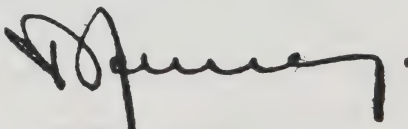
Much of the difficulty encountered by Mangatal was regrettably due to the confusion and delay in the processing of his charge. This arose largely from the inconsistent application of the Union's newly amended Constitution as referred to earlier. Notwithstanding this confusion and delay, the ultimate determination by Hargrove was done in concert with, and consistent with, all of the others who were equally accused across the country. There is simply no basis on which the Board can conclude that the standards of discipline of the trade union, or the penalty imposed, were applied to Mangatal in a discriminatory fashion.

VII

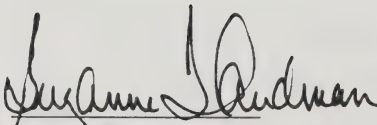
The above having been said, one matter remains. According to the evidence, the last day that Mangatal worked in breach of the Union's picket-line directive was March 26, 1995. However, according to Pellerin's testimony, charges were not filed against Mangatal until May 15, 1995. The evidence before the Board, and specifically the testimony of Pellerin, appears to leave no doubt that the charge against Mangatal was proscribed by time pursuant to the provisions of Article 24 of the Union's Constitution.

That notwithstanding, it is not for the Board to decide how Mangatal's current appeal - taken pursuant to the terms of the Union's Constitution - of his conviction in the face of this apparent untimeliness of the original complaint is to be determined. That is a matter to be left to the Union's appeal process itself. We were, however, assured by Pellerin that the Union's appeal process would be fair and judicious. We have no hesitation in accepting his statement in that regard.

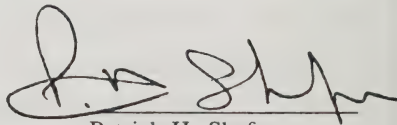
The complaint is dismissed.



Richard Hornung, Q.C.  
Vice-Chair



Suzanne Handman  
Vice-Chair



Patrick H. Shafer  
Member

CAI  
L100  
-ISA

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## Summary

Office and Technical Employees Union, Local 15, *applicant*, and Canadian Freightways Limited and Transport CFQI Inc., doing business as Epic Express, *employers*.

Board File: 560-338  
CLRB/CCRT Decision no. 1209  
September 29, 1997

## Résumé

Office and Technical Employees Union, section locale 15, *requérant*, et Canadian Freightways Limited et Transport CFQI Inc., exploitée sous la raison sociale Epic Express, *employeurs*.

Dossier du Conseil: 560-338  
CLRB/CCRT Décision n° 1209  
le 29 septembre 1997

The Office and Employees Technical Union, Local 15, filed an application pursuant to section 35 of the Code seeking a declaration that Canadian Freightways Limited ("CFL") and Transport CFQI Inc., doing business as Epic Express, constitute a single employer for the purposes of Part I of the Code. CFL contested the application, viewing it as an attempt by the union to expand its Western based bargaining rights into Eastern Canada.

The Board first examined the issue of timeliness and held that - unless the other party suffered serious prejudice by the delays involved - a simple lapse of time would not be sufficient to reject a meritorious application. In the present instance, the evidence led the Board to conclude that the union had acted with reasonable diligence.

La section locale n° 15 du syndicat Office and Employees Technical Union a présenté, en vertu de l'article 35 du Code, une demande de déclaration selon laquelle Canadian Freightways Limited («CFL») et Transport CFQI Inc., exploitée sous la raison sociale Epic Express, constituent un seul employeur aux fins de l'application de la Partie I du Code. CFL a contesté la demande, y voyant une tentative du syndicat d'étendre les droits de négociation qu'il avait dans l'Ouest à l'Est du Canada.

Le Conseil a d'abord examiné la question du respect des délais et a jugé que, à moins que l'autre partie n'ait subi un grave préjudice par suite des retards, un simple laps de temps ne justifierait pas le rejet d'une demande valable. En l'espèce, le Conseil a conclu, compte tenu de la preuve, que le syndicat avait agi avec une diligence raisonnable.

On the merits of the case, after having determined that all the prerequisites of section 35 have been met, the Board granted the single employer declaration. The scope of the union's certification provides it with the right to represent office employees at all locations where CFL is operating. In the Board's view, the company's locations in Eastern Canada - albeit under the name of Epic Express - clearly fall within the scope of the union's certification. Consequently, the declaration will give effect to the intent and scope of the existing certification order.

Relativement au bien-fondé de l'affaire, ayant déterminé que toutes les exigences stipulées à l'article 35 avaient été satisfaites, le Conseil a fait droit à la demande de déclaration d'employeur unique. Selon la portée de son accréditation, le syndicat a le droit de représenter les employés de bureau partout où CFL a des établissements. De l'avis du Conseil, les établissements de l'entreprise dans l'Est du Canada - quoique sous le nom d'Epic Express - sont clairement visés par l'accréditation du syndicat. Par conséquent, la déclaration donnera effet à l'objet et à la portée de l'ordonnance d'accréditation existante.

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## Reasons for decision

Office and Technical Employees Union,  
Local 15,

*applicant,*

*and*

Canadian Freightways Limited and  
Transport CFQI Inc., doing business as  
Epic Express,

*employers.*

Board File: 560-338  
CLRB/CCRT Decision no. 1209  
September 29, 1997

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The Board was composed of Ms. Suzanne Handman and Mr. Richard I. Hornung, Q.C., Vice-Chairs, and Mr. Michael Eayrs, Member. A hearing was held on March 25 and 26, 1997, at Vancouver.

### Appearances

Ms. Leah Terai, counsel, accompanied by Mr. Barry Hodson, President, OTEU, Local 15, for the applicant; and

Mr. Bruce R. Grist, counsel, accompanied by Mr. Trevor Robinson, articling student, for the employers.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

This case concerns an application pursuant to section 35 of the Canada Labour Code (Part I - Industrial Relations) filed by the Office and Technical Employees Union, Local 15 (the "union"), seeking a declaration that Canadian Freightways Limited

("CFL" or "Canadian Freightways") and Transport CFQI Inc. ("TCFQI"), now doing business as Epic Express, constitute a common employer for the purposes of Part I of the Code. The application originally included Canadian Freightways Eastern Limited ("CFEL") as a respondent but, in a subsequent submission, the union advised the Board that CFEL is not the subject of this application.

The parties concerned agree that the criteria set out in the Code regarding a section 35 declaration are met in the present case. The issue in dispute is whether there exists a labour relations purpose for granting such a declaration. The union which represents the office employees of CFL claims that a declaration is necessary to protect the ongoing effect of its certification order. CFL, on the other hand, maintains that historically the union has represented its clerical employees in Western Canada and the effect of the application is not to preserve its bargaining rights but to expand them into Eastern Canada. In addition, CFL has raised the timeliness of the application.

## I

The respondent CFL is a wholly owned subsidiary of Consolidated Freightways Corporation of Delaware. The parent company of these corporations and other trucking and transportation related companies is Consolidated Freightways Inc., a U.S. congeneric corporation.

CFL operates as a trucking carrier of general freight. The company, incorporated in 1941, was initially based in Alberta, British Columbia, and the Yukon Territories. The company expanded in Western Canada into Saskatchewan and Manitoba in the mid-1980s. Its expansion into Eastern Canada developed through other means. In 1967, as an avenue to enter the Ontario market, CFL purchased Hanson Transport, which had approximately 60% of its business in Ontario, and renamed the company Canadian Freightways Eastern Limited (CFEL). In the 1970s, CFEL began using the Consolidated Freightways name for marketing purposes and by the early 1980s it became an exclusive arm of CFL. CFEL is a wholly owned subsidiary of Canadian

Freightways with common officers and directors, but operationally it provides services as the northern end of Consolidated Freightways Corporation of Delaware's international trucking operations from the United States into Canada.

In 1981, TCFQI was incorporated with the view of expanding operations in Eastern Canada to a larger part of Ontario and into Quebec. While the company initially serviced subsidiaries of Consolidated Freightways Inc., it subsequently attempted to develop and regain the Ontario market that CFEL used to have. TCFQI, a wholly owned subsidiary of CFL, began its operations in Toronto in 1987; in 1988 and 1989, terminals were opened in Montreal and Ottawa as well. The company, unsuccessful in penetrating the marketplace as "CF a division of TCFQI", decided it needed its own operations in the east. As a result, Epic Express was launched in October 1995.

The focus of Epic Express' business is in the Niagara Peninsula, Toronto, Ottawa and Montreal corridor. Freight goes from east to west and vice versa by means of rail, intermodal, or by road. Approximately 42% of its business is regional while 58% comes from Western Canada. According to Mr. Darshan Kailly, President and General Manager of Canadian Freightways, Epic Express has enabled CFL's coverage to expand and it is now viewed as an international carrier. However, no bargaining unit work has been transferred east nor has any of the clerical employees of Epic Express come from Western Canada. There are nevertheless ties between the companies. TCFQI and CFL have common officers and directors. TCFQI also shares a number of services with CFL, such as payroll and computer services.

## II

Opal Skilling, Secretary Treasurer of the Office and Technical Employees Union, Local 15, was involved in the union's original certification application in 1968 for a unit of employees of Canadian Freightways. While there had been a previous certification issued in 1964 to another union for clerical and other office employees employed by the company in North Burnaby, British Columbia, the union sought to

expand the certification to represent all office employees in British Columbia, Alberta and the Yukon. To the union's knowledge, these were the only areas where the company's office employees were located. Ms. Skilling testified that the union was not aware of the existence of CFEL in Eastern Canada nor of any other CFL locations.

In 1989, the union requested inter alia that its bargaining unit description be updated to reflect the current situation. The application was granted with the amended description reading as follows:

*"all office employees of Canadian Freightways Limited employed at its terminals, excluding managers, foremen, dispatchers, supervisors, working agents, sales trainees and sales co-ordinators."*

Over time, the company expanded its operations to the Northwest Territories, Saskatchewan, and Manitoba and voluntarily recognized the union in each of these locations. While the certification did not specify the particular locations, they were listed in the collective agreement. This, according to Ms. Skilling, was due to the difference in rates established according to the geographic location of the company's offices.

Mr. Ken Czech, Director of Human Resources of Canadian Freightways, as well as other witnesses confirmed the fact that as new offices were opened and new terminals became operational (for example, Kelowna, Regina, Saskatoon and Winnipeg), they were included in the company's scope of operations and in the collective agreement. Their recognition was not an issue. In fact, when the question arose at the time of negotiations, the company rubber-stamped their inclusion. The same position, however, was not adopted with respect to the company's Eastern operations.

Mr. Barry Hodson, President of Local 15, believed that the union was certified for all the company's locations. Geographic locations were not an issue in negotiations.



To his knowledge, new or expanded offices were subsequently negotiated into the collective agreement. The union discovered the existence of other locations in 1990 or 1991. After Mr. Hodson became aware that Canadian Freightways was shipping goods eastwards, he raised questions regarding this activity during the 1991 set of negotiations. He was told by the Director of Human Resources, Mr. Czech, that the Eastern operations were being handled by agencies, under a separate corporate identity, and no employees were involved. The issue was then dropped at the bargaining table.

The union became aware in 1993 that the Toronto and Montreal locations were in fact staffed when it found these locations appearing on the CFL computer system. There was also increased involvement with the employees at these terminals. In the 1993 negotiations, the issue of the Eastern operations came up again. The union's proposals specifically included the addition of Montreal and Toronto to the list of locations included in the collective agreement. (The existence of the Ottawa location only became known to the union some time in 1994.) Again Mr. Czech advised the union that a separate legal entity, TCFQI, was acting as an agent for the operations in Eastern Canada, and the Toronto and Montreal locations were therefore not covered by the union's certification. In response to Mr. Hodson's request for documentation to substantiate this claim, Mr. Czech told him he could file a common employer declaration with the Board if he wished, and the company would respond accordingly. The union's proposal was withdrawn from the bargaining table on May 12, 1994.

The union decided to investigate the matter and began to gather information as to how the terminals in Montreal, Toronto and Western Canada worked together. In the fall of 1994, Mr. Hodson visited the terminal in Toronto and found the signage was the same as the one in Burnaby, British Columbia. Mr. Dick Allebone, Chief Steward and a member of the union's negotiating committee, visited the terminals in Montreal and Toronto and noted that the work performed was no different from that in Edmonton and Vancouver. The information obtained by the union includes the following: freight bills showing Canadian Freightways as a division of TCFQI; a communiqué

introducing Epic Express as a new CF Canadian company; memorandums advising service centre managers that newly coded locations would be served directly and not by means of an interline carrier; and a printout showing the same address for both Canadian Freightways and Epic Express. In further documentation, the Canadian Freightways messaging system indicates a Montreal location on a message originating from Calgary, an employee list includes locations at Montreal, Toronto and Ottawa, and printouts in the system show communication between locations in Eastern and Western Canada.

Following this investigation, the union filed the present application with the Board.

During the course of the hearing, CFL presented a great deal of evidence concerning the relationship between CFL and CFEL despite the fact that the union had amended its application removing CFEL as a respondent. The union, on the other hand, distinguished the operations of TCFQI from those of CFEL. Mr. Allebone, the Chief Steward, testified that CFEL was of no concern to the union; the company does not work in Western Canada and there are no dealings with it. In contrast, there is a working relationship with the employees of Epic Express. The union expressed its fear that Epic Express will work its way across the country as a non-union operation.

### III

Canadian Freightways raised the issue of delay in bringing the present application. Specifically, the company claims that CFEL has existed since 1967 and TCFQI has operated since the early 1980s. There have been different attempts during that period to develop the Ontario businesses of these two entities; Epic Express is simply the latest attempt to acquire a greater share of the Ontario market for the Consolidated group of companies. However, clerical employees of both companies have existed over the years with the union's knowledge and acquiescence. The company maintains that given the newsletter, annual reports, and integrated mail and computer systems, it is not possible that union stewards were not aware of the Eastern operations - at the

very latest by 1990. Consequently, even if the union could establish a labour relations purpose for making its application, the union's delay in doing so is fatal.

The evidence indicates that the union was not aware of the Eastern operations until approximately 1990 and was unaware of the Ottawa location until 1994. When the union suspected that other locations existed, it advised the company that it sought their inclusion, raising the issue in negotiations, first informally in 1991 and then officially in 1993. In both instances, the company maintained that those locations were run by agencies with a separate corporate existence. As such they were excluded from the collective agreement. Given this information, the union withdrew its proposals in the spring of 1994. The union subsequently investigated the situation and filed the current application for a common employer declaration.

It should be noted that the Board has not in the past considered that delay in requesting a common employer declaration constituted a bar for the filing of an application pursuant to section 35 (see Reuters Information Services (Canada) Limited and Starfish Systems Inc. (1995), 99 di 64 (CLRB no. 1138)). While the Board, in a number of decisions, has indicated that the timing of the application is an important consideration in deciding whether or not to exercise its discretion and grant a single employer declaration (see Calgary Television Limited and Lethbridge Television Limited (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRB no. 118); Nolisair International Inc. (Nationair Canada) et al. (1992), 89 di 94 (CLRB no. 960); and Music Mann Leasing Ltd., Bus Drivers (London) Inc. (1982), 51 di 51; and [1982] 2 Can LRBR 337 (CLRB no. 381)), a simple lapse of time would not, in our view, be sufficient to reject a meritorious application unless it could be shown that the other party suffered serious prejudice by the delay involved.

In the present instance, it is not necessary to consider the issue of serious prejudice. Our review of the evidence adduced leads us to conclude that there has been no undue delay on the part of the union. In light of the position adopted by CFL during negotiations and the necessity for the union to carry out an investigation and obtain

the requisite information with respect to the company's Eastern operations, the Board considers that the union acted with reasonable diligence in bringing this matter before it. Consequently, CFL's objection regarding the untimeliness of the application is dismissed.

#### IV

The union submits that its bargaining rights as set out in its certification and collective agreement give it the right to represent all of CFL's employees working at its terminals. This right, the union maintains, is not limited to Western Canada. While the union historically represented employees of CFL in Western Canada, that was where the company's operations were situated at that time. When the union raised questions concerning the Ontario and Quebec locations during negotiations, CFL denied the existence of employees at those locations. The union maintains that the purpose of its application is to protect the effect of its certification order which is ongoing.

The union distinguishes the operations of CFEL from those of Epic Express. The former, it claims, is a distinct entity from CFL, serves a different market, and did not become an international carrier. In contrast, the union submits there is a high degree of integration of the operations of CFL and Epic Express, such that the operations of both companies are virtually one.

The union argues that the east-west division is an artificial line being drawn by the company. There is a blending of employees of the two companies who work in a closely integrated system and are dependent on each other, but bargaining rights are being fragmented between union and non-union employees. By its application, the union seeks only to preserve its existing bargaining rights and protect the ongoing effect of its certification order.



The employer submits that CFL has only operated in Western Canada and has serviced that geographical market, while CFEL and TCFQI have serviced the Ontario/Quebec geographical market. The intended scope of the union's certification, it claims, is Western Canada and the scope of its rights is clearly established by the collective agreement, which sets out the locations of those clerical employees represented by the union.

The employer maintains that the union's representational rights have not been impacted in any way. The union has never represented any employees in Ontario although the Eastern operations have existed since 1967, a year prior to the union's certification with CFL. The union continues to represent all the clerical employees at CFL's service centres in Western Canada, which historically has been the group that it represents.

According to the employer, what the union is attempting to do through the section 35 application is to sweep in a group of employees it has never represented without going through the certification procedures set out in the Code. In short, the employer maintains that the effect of a single employer declaration is not to preserve the union's bargaining unit as it exists, but rather to expand it into Eastern Canada where it has never existed. As for the union's concern about Epic Express coming into Western Canada as a non-union operation, the company maintains that this is speculative and not supported by the evidence.

## V

Section 35 of the Code grants the Board discretion to declare that two or more employers constitute a single employer for the purposes of the Code. It provides:

*"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to*

*make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."*

Before the Board decides whether or not it will exercise its discretion to make a single employer declaration pursuant to the Code, the following five criteria must be met:

- "1. two or more enterprises, i.e., businesses,*
- 2. under federal jurisdiction,*
- 3. associated or related,*
- 4. of which at least two, but not necessarily all, are employers*  
*(Emde Trucking Ltd., *supra*),*
- 5. the said businesses being operated by employers having*  
*common direction or control over them."*

(Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127  
(CLRB no. 699), page 145)

In the present case, the parties agree that the above criteria are met. The Board nevertheless must satisfy itself under section 35 that this is so (Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association (1996), 101 di 1 (CLRB no. 1155)). For our part, it is clear from a review of the facts that each criterion has been met.

## VI

The fulfilment of the above-cited requirements is not in itself sufficient to grant a single employer declaration under section 35 of the Code. Once the Board determines that the criteria have been met, it must still decide whether it will exercise its discretion to make a single employer declaration. The Board has held that in making

such a determination it must be satisfied that there exists a labour relations purpose (see The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRBR no. 60); British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRBR no. 108); Emde Trucking Ltd. (1985), 60 di 66; and 10 CLRBR (NS) 1 (CLRBR no. 501); Autocar Connaisseur Inc. and Murray Hill Limousine Service Ltd. (1988), 76 di 139 (CLRBR no. 723); Canada Transport Group Ltd. (1989), 78 di 174; 5 CLRBR (2d) 119; and 89 CLLC 16,044 (CLRBR no. 759); Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRBR no. 771); and Ottawa-Carleton Regional Transit Commission et al. (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRBR no. 670), affirmed by the Federal Court of Appeal in Amalgamated Transit Union v. Ottawa-Carleton Regional Transit Commission et al., judgment rendered from the bench, no. A-110-88, May 2, 1989 (F.C.A.)).

The purpose of section 35 has traditionally been considered to be remedial in nature, that is to prevent erosion of bargaining rights or avoidance of employers' obligations under the Code. However, the Board has recently expanded that purpose in the case of Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association, *supra*, although, as indicated in that case, the undermining of bargaining rights remains a paramount consideration.

In the present case, the employer submits that there is no evidence of any loss of bargaining work or representation rights. On the contrary, it maintains Epic Express has created work. The union's response is that the test is not only that rights are being undermined but also that they are likely to be undermined.

The concept of a potential erosion of bargaining rights is not new. The Labour Relations Board of British Columbia in Katchmar Construction Ltd., no. 201/83, July 18, 1983 (BCLRB), stated that rights may be protected for the future:

*"... Depending on the circumstances in any particular case, the Board may well still find that a Section 37 declaration is necessary to protect a trade union's rights for the future;..."*

(page 13)

In Quebec Mover's Traffic Consultants Inc. et al. (1981), 45 di 111 (CLRB no. 326), this Board declared two companies to be a single employer based on an apprehended situation that could arise in the future:

*"... The Union therefore fears - and this is why it applied under section 133 - that these employers may circumvent the scope of application of two separate certifications if, for the purposes of labour relations, the Board considers only appearances and maintains that two separate employers exist. To be more specific, the Union fears that, if Lapointe, the Consultants and their employees are not covered by one and the same declaration under section 133 of the Code, the viability of the separate bargaining units may be endangered because employees could be transferred freely from one company to the other. The Board wishes to ensure that the bargaining units are viable, and it deems it preferable, in this case, to prepare for any future situation immediately, since the problem has been raised, in order to avoid any confusion later. ..."*

(page 116)

While a declaration may be made to preclude the potential erosion of the existing bargaining rights, it is not necessary to decide the present case on that basis. An important consideration in the present instance is the actual scope of the bargaining unit and the ongoing effect of the certification order. As the Board stated in Transport Route Canada Inc. et al. (1987), 70 di 153; and 17 CLRBR (NS) 340 (CLRB no. 638):

*"... If bargaining rights granted by certification orders were only to affect the employees who were employed at the time the order was issued and not those who are hired thereafter, the whole statutory scheme of certification and the scope of bargaining units under the Code would soon be subverted. That is one reason why certification orders are designed to affect classifications of employees rather than*



*the incumbent employees by name. This gives the order an ongoing or generic effect. ..."*

(pages 160; and 348)

The certification issued to the union as amended grants it bargaining rights for "all office employees of Canadian Freightways Limited employed at its terminals...". The order is neither enumerative nor is it restricted to Western Canada. While the union originally represented CFL's clerical employees situated in British Columbia, Alberta, and the Yukon, that was, to the union's knowledge, where CFL was operating. As other terminals in Western Canada became operational they were included in the collective agreement. The ongoing effect of the certification order - which in the past had properly been recognized by CFL - necessarily encompasses any new terminals of CFL where the same functions are being performed. This however did not occur with respect to the company's Eastern operations. In these locations, not only did the company not recognize the union at the terminals of Toronto, Montreal and Ottawa, but when questioned by the union, it denied the existence of employees at these locations.

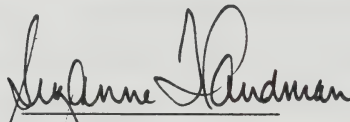
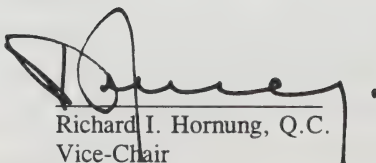
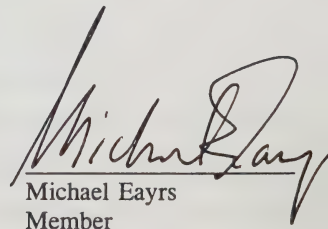
The issue is not whether the company intended to frustrate the purposes of the Code by the creation of another enterprise; the mere fact that non-union employees are performing the same functions as the unionized employees in the same corporate family constitutes a fragmentation of the work-force and undermines the intent and scope of the existing certification order. As the Board stated in Transport Route Canada Inc. et al., supra:

*"... 'are the same functions being performed on both sides of the corporate veil?' If they are, this should satisfy the need for a labour relations reason for the Board to exercise its discretion under section 133. ..."*

(pages 160; and 348)

In essence, the scope of the union's certification provides it with the right to represent office employees at all locations where the company is operating. Given that the evidence presented leaves no doubt as to the existence of the company's operations in Montreal, Toronto and Ottawa - albeit under the name of Epic Express - the Board considers that these locations fall within the scope of the union's certification.

In light of the foregoing, and to give effect to the existing certification order, the single employer declaration is granted. The Board declares pursuant to section 35 of the Code that Candian Freightways Limited and Transport CFQI Inc., doing business as Epic Express, are a single employer for the purposes of Part I of the Code and declares that Canadian Freightways Limited and Transport CFQI Inc., doing business as Epic Express, are bound by the collective agreement negotiated between Canadian Freightways Limited and the union.

  
Suzanne Handman  
Vice-Chair  
Richard I. Hornung, Q.C.  
Vice-Chair  
Michael Eayrs  
Member

# information

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## Summary

The Society of Ontario Hydro Professional and Administrative Employees, *applicant*, and Power Workers' Union, CUPE Local 1000, *interested party*, and Ontario Hydro, *employer*.

Board File: 610-142  
CLRB/CCRT Decision no. 1210  
October 21, 1997

This is a referral to the Board pursuant to section 65 of the Canada Labour Code filed by the Society of Ontario Hydro Professional and Administrative Employees (the Society), and supported by the employer, (Ontario Hydro) and by the arbitrator.

The issue in dispute concerns the jurisdiction over the first-line supervision of mechanical maintainers employed by Ontario Hydro at Bruce A and Bruce B nuclear generating stations which is claimed by both the Society and the Power Workers' Union (PWU).

The Board's inquiry in the context of work jurisdiction disputes focuses on the analysis and characterization of the nature of the work performed in light of the intended scope of the recognition clause and/or bargaining certificate.

## Résumé

Society of Ontario Hydro Professional and Administrative Employees, *requérante*, et Power Workers' Union, SCFP, section locale 1000, *partie intéressée*, et Ontario Hydro, *employeur*.

Dossier du Conseil: 610-142  
CLRB/CCRT Décision n° 1210  
le 21 octobre 1997

Il s'agit d'un renvoi au Conseil conformément à l'article 65 du Code canadien du travail, déposé par Society of Ontario Hydro Professional and Administrative Employees (l'association) et appuyé par l'employeur (Ontario Hydro) et par l'arbitre.

La question en litige concerne la compétence syndicale dont relève le travail des surveillants immédiats des préposés à l'entretien des machines employés par Ontario Hydro aux centrales nucléaires Bruce A et Bruce B. L'association et le Power Worker's Union (PWU) revendiquent toutes deux cette compétence.

L'enquête du Conseil dans le contexte des litiges ayant trait à la compétence sur les tâches porte surtout sur l'analyse et la qualification de la nature du travail exécuté à la lumière de la portée intentionnelle de la clause de reconnaissance et (ou) du certificat d'accréditation.

In the present case, the Board concluded that the nature of the work of the first-line supervisors is, at core, supervisory work which is covered by the intended scope of the Society's bargaining certificate. It is not the work of the "working supervisors" or lead hands which fall within the PWU's jurisdiction according to the terms of the PWU collective agreement.

Accordingly, the Board declared that first-line supervisors of mechanical maintainers at Bruce A and B are "supervisors" within the meaning and scope of the Society's certificate, are bound by the Society's collective agreement and returned the matter to the arbitrator for disposition.

En l'occurrence, le Conseil a conclu que le travail des surveillants immédiats est, essentiellement, de par sa nature, un travail de surveillance visé par la portée intentionnelle du certificat d'accréditation de l'association. Il ne s'agit pas d'un travail de contremaître exécutant ou de chef d'équipe, lequel relève de la compétence de la PWU aux termes de la convention collective de la PWU.

En conséquence, le Conseil a déclaré que les surveillants immédiats des préposés à l'entretien des machines aux centrales Bruce A et Bruce B sont des «surveillants» au sens de la convention collective de l'association, dans le cadre du certificat de l'association et qu'ils sont liés par la convention collective de l'association, et il a renvoyé la question à l'arbitre afin que celui-ci rende une décision.

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## Reasons for decision

The Society of Ontario Hydro  
Professional and Administrative Employees,

*applicant,*

*and*

Power Workers' Union, CUPE Local 1000,

*interested party,*

*and*

Ontario Hydro,

*employer.*

Board File: 610-142  
CLRB/CCRT Decision no. 1210  
October 21, 1997

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The Board was composed of Mr. J Philippe Morneau, Vice-Chair and Members Michael Eayrs and Roza Aronovitch. Hearings were held on July 22 and 23, September 11 and 25, and December 16 to 20, 1996 in Toronto.

### Appearances

Messrs. James K. Hayes and Michael Wright, counsel, accompanied by Mr. Jeff Berg, for the applicant;

Mr. Donal K. Eady, counsel, accompanied by Mr. William Campbell, for the union;

Mr. Richard I. Charney, accompanied by Messrs. Ivars Starats and David Ivany, for the employer.

These reasons for decision were written by Ms. Roza Aronovitch, Member.

I

INTRODUCTION

This is a referral to the Board pursuant to section 65 of the Canada Labour Code filed by the Society of Ontario Hydro Professional and Administrative Employees ("the Society") on April 27, 1995, and supported by the employer, Ontario Hydro, and by the arbitrator Howard Brown.

The grievance before the arbitrator is a policy grievance which was filed by the Society following a work assignment at the Bruce Nuclear Power Development. The narrow question to be decided by the arbitrator concerns the jurisdiction over the first-line supervision of mechanical maintainers ("MM") employed by Ontario Hydro at the Bruce A and Bruce B Nuclear Generating Stations. Both the Society and the Power Workers Union ("PWU") claim this jurisdiction. The outcome of the grievance, however, has potential repercussions with respect to trades supervision across Ontario Hydro.

II

THE UNIONS' JURISDICTIONS

In various forms, the PWU and the Society have co-existed at Ontario Hydro for many years. Prior to the Supreme Court decision in Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, all parties proceeded as if labour relations within what is now Ontario Hydro Nuclear were governed by the laws of the province of Ontario. Since 1944, the union now referred to as the PWU has been voluntarily recognized by Ontario Hydro to the extent of the scope clauses contained in the collective agreements.

The PWU represented all "employees" of Ontario Hydro prior to 1973. At that time, the term "employee" was understood to refer only to those employees who were included within the restrictive definition of that term then contained in the Ontario Labour Relations Act (OLRA). Subsequently, in 1973, the form of the PWU scope clause was determined by arbitration and remained essentially unchanged until 1994. The scope clause in the 1992 collective agreement - which applied at the time the Society filed its grievance - reads as follows:

**"ARTICLE 1**  
**RECOGNITION**  
**COLLECTIVE BARGAINING UNIT**

*1.1 Ontario Hydro recognizes the Union as the sole bargaining agent for all regular, part-time and temporary employees, including technicians and clerical employees of the construction field forces but excluding:*

- (a) Employees now represented by other bargaining agents.*
- (b) Employees assigned to full-time security work.*
- (c) Persons above the rank of working supervisor.*

*1.2 'Employees' are employees pursuant to the Labour Relations Act for Ontario RSO, 1980 Chapter 228, as amended, with the exception of those persons who are excluded by the following criteria: ..."*

*(emphasis added)*

Article 1.2 B clarifies the criteria for exclusion from the scope clause by reason of managerial functions as follows:

*"1. Requirement to make effective recommendations\* regarding any of the following:*

- a) Organizational objectives such as staffing needs, work methods, organizational restructuring, Ontario Hydro policy, budgets and investments.*
- b) Hiring, suspension, discharge, promotion, demotion, discipline.*
- c) A change in the status of an individual's employment in terms of wage rates, working hours or transfer to other positions or locations.*
- 2. The job requires assessing and/or replying to employee grievances in accordance with Article 2.*
- 3. The job involves training, instructing and evaluating the development of managerial employees in management skills.*
- 4. The job carries the authority to interpret and administer the collective agreement.*
- 5. The job contains responsibility for the preparation of or custody and access to personal confidential personnel information resulting from investigations and into the conduct, character or capability of employees.*

*\*Effective recommendation means more than providing guidance and advice but does not necessarily include final authorization. It does, however, include responsibility and accountability for making such recommendations."*

In 1987, in response to Ontario Hydro's continued attempts to broaden excluded categories in the PWU scope clause, the PWU negotiated PW-31, a mid-term agreement which set out a process designed to deal with issues of scope. The PWU challenged approximately 300 classifications covering 1300 employees under this agreement. Five of the cases went to arbitration. According to the PWU, it has never been necessary to refer to the Society's master agreement in order to resolve these jurisdictional problems.



The PWU also raised the jurisdictional problem before the Board in 1994 in the context of the Society's certification application. However, the Board did not find it necessary to address the question in granting the certificate to the Society as the matter was already at arbitration (Ontario Hydro (1994), 94 di 60; and 25 CLRBR (2d) 154 (CLRBR no. 1065)).

The Society and its predecessors have represented Hydro employees for over 50 years. At the beginning, this was a somewhat informal relationship. The Society began as an organization of professional engineers, but, over the years, it broadened its mandate to include a range of managerial, professional and supervisory staff.

In June 1976, Hydro recognized the Society as the exclusive representative of its management and professional staff and all field management professional staff. This agreement superseded a series of prior agreements dating back to the 1940s. In 1981, the Society received petitions from numerous Trades Supervisory ("TS") and Office Supervisory employees who had not hitherto been represented by the Society or by the PWU. The TMS classification at issue in the present case belongs to the TS group. The PWU never represented this class of employees and it took no exception to the Society representing these classifications.

In 1991, the Society signed a voluntary recognition agreement with Hydro and was expressly brought within the realm of the Ontario Labour Relations Act.

With respect to employees working in what is now Ontario Hydro Nuclear, the Society was certified by the CLRB on May 27, 1994 (file no. 555-3662), as amended on October 11, 1994 (530-2341), as exclusive bargaining agent for a unit of Ontario Hydro Nuclear employees including "supervisors":

*"All employees of Ontario Hydro employed within Ontario Hydro Nuclear in the Province of Ontario as supervisors, professional engineers, engineers-in-training or scientists, and professional, administrative and associated employees, save and except persons employed in a confidential capacity with respect to labour relations;*

*and persons in bargaining units for which any trade union holds bargaining rights."*

(emphasis added)

The scope clause and related provisions of the applicable collective agreements read as follows:

#### Article 2.2

*"All employees of Ontario Hydro employed by Ontario Hydro Nuclear (OHN) in the Province of Ontario employed as supervisors, professional engineers, engineers-in-training or scientists, and professional, administrative and associated employees, save and except for persons who perform managerial functions as distinct from supervisory functions; persons employed in a confidential capacity with respect to labour relations; [and persons in bargaining units for which any trade union held bargaining rights] as of November 13, 1991."*

#### Article 2.3.2(a)

*"Supervisors" means employees who primarily perform supervisory functions, including the requirement to make recommendations regarding any staff or personnel matter," including selection, promotion, appraisal, discipline, transfer, staffing needs, work methods, changes in terms and conditions of employment, grievances, or the interpretation and administration of the applicable Collective Agreement."*

#### Article 2.4 Supervisory Employees - Code of Ethics

*"Ontario Hydro agrees to include supervisory employees in the bargaining unit on the condition that the parties recognize that supervisory employees will continue to exercise key functions in the control and operation of Ontario Hydro. As member of Ontario Hydro's managerial staff, supervisors use judgment to express and make operative the decisions of management. They are responsible for fostering a healthy work environment. The parties recognize the responsibility of supervisors to discharge their supervisory duties in good faith. The Society and Ontario Hydro will identify, minimize and/or avoid the conflicts/perceived conflicts of interest that may*

*arise concerning the relationship between supervisors, the Society and Ontario Hydro.*

*It is recognized that supervisory employees may be disciplined for failure to act in good faith as a representative of management, and fulfilling their responsibilities including abuse of supervisory position and breach of trust."*

(emphasis added)

### III

#### THE EVENTS LEADING TO THE CONFLICT

The Society and the PWU co-existed for years without major jurisdictional conflict. However, starting sometime in the early 1990s, Hydro began a massive restructuring plan which had a significant impact on their relationship. In short, it appears clear to the Board that friction between the two unions increased as a result of the many difficult personnel decisions that must be made when an organization the size of Ontario Hydro seeks to rationalize its operations. The flashpoint, of course, has been the hazy jurisdictional frontier separating the two unions at the first-line supervisor level.

In or around the summer of 1992, the Corporation commenced reorganization of the supervisory ranks in Ontario Hydro Nuclear. One of the questions that were to be addressed was the question of the inconsistent use of UTs and TMs as first-line supervisors of mechanical maintainers throughout Ontario Hydro Nuclear.

Mechanical maintainers are skilled tradespersons who work in the major facilities of Ontario Hydro Nuclear. The PWU represents MMs at the Bruce A and Bruce B Nuclear Generating Stations, the Bruce Heavy Water Plant, the Nuclear Waste and Environmental Services Division, Pickering A and Pickering B Nuclear Generating Stations, and the Darlington Nuclear Generating Station.

The first-line supervision of MMs has been inconsistent across Hydro and there has accordingly been some confusion between the duties of the TMS classification and of the UTS classification. In some cases, according to the location, MMs are directly supervised by union trades supervisors ("UTS") represented by the PWU, and in other cases by trades supervisors ("TS") or trades management supervisors ("TMS"), represented by the Society. More specifically within the UTS and TMS classifications, the UTS-2s and the TMS-3s are the crew foremen or first-line supervisors of MMs, also referred to as union foremen and management foremen respectively.

Generally speaking, TMSs were used as first-line supervisors at Darlington, at the Bruce Heavy Water Plant, at the Nuclear Waste and Environmental Services Division and at the Bruce Production Support Department. Elsewhere, including Bruce A and B, UTSs were used.

The Production Support Department existed as a kind of centralized Mechanical Maintenance Department. TMSs who supervised operations in this department rotated between stations as work demanded, but spent the greatest part of their time at either Bruce A or Bruce B. During the reorganization in 1993, the central maintenance facility was abolished - though apparently the services have since been re-centralized - and some TMSs were allocated positions at Bruce A and Bruce B, whereupon the PWU threatened strike action if these allocations were not rescinded.

In July 1993, a management committee known as the UTS-TMS Resolution Committee issued a report whereby it recommended that the first-line supervisory structure remain the same at all Ontario Hydro Nuclear installations except for Bruce A and Bruce B. This posed a particularly difficult problem given the reallocation of the Production Support Department TMSs to Bruce A and Bruce B.

For Bruce A and Bruce B, the Committee recommended that first-line supervision be standardized and that all first-line supervisory duties being performed by TMSs be



transferred to the UTSs. This proposal was accepted by management at the Bruce stations. It would have resulted in the elimination of approximately 16 TMS positions and the creation of 19 UTS positions at Bruce A and B. However, in August 1993, a tripartite implementation team reached an agreement that recommended that the reallocated TMSs be made acting shift maintenance supervisors (SMS), which is a non-contested supervisory position. This temporary assignment would continue essentially, it seems, until the TMSs retired, were promoted or found work elsewhere, failing which it would end on September 1, 1994.

The Society accepted this agreement on the condition that it was without prejudice to its position on the question of its jurisdiction to represent the disputed first-line supervisory personnel. Thus, when the agreement was implemented, it grieved the elimination of TMS-3 positions at the Bruce stations and the transfer of their duties to UTSs. The grievance was not resolved and was referred to arbitration by the Society. Arbitrator Howard Brown was seized of the matter, but on December 12, 1994, the arbitrator confirmed that, in his opinion, the jurisdictional question should first be referred to the Board pursuant to sections 65(1) and (2) of the Code.

#### IV

##### PRELIMINARY OBJECTION

On September 11 and 25, 1996, the Board heard the parties on the preliminary objection raised by the PWU to the effect that the Board was without jurisdiction to hear the case on its merits as the grievance, which was the basis of the referral to the Board, had been settled by virtue of the agreement entered into in August of 1993 by Hydro, the Society and PWU. It was PWU's submission that the tripartite agreement was conclusive of the matter.

By letter dated October 25, 1996, the parties were advised that the Board was not persuaded that the grievance was in fact settled and had concluded that in any event,

it would have rejected the preliminary objection even if the grievance had been settled on the basis that the referral by the arbitrator constitutes a separate question which survives the settlement or disposition of the grievance. Reasons for the Board's decision on the preliminary objection are incorporated herein.

Section 65 of the Code provides as follows:

*"65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for hearing and determination.*

*(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding."*

The argument of the PWU was that the Board had no jurisdiction since the arbitrator would not have had jurisdiction - because of the settlement -. The argument was never made before the arbitrator.

An arbitrator who is seized with a grievance under a collective agreement would properly have jurisdiction to determine the question so long as the arbitrator did not make a decision that he or she did not have jurisdiction. Such a decision would not render void *ab initio* any proceedings before the arbitrator which had taken place in the interim prior to the decision on jurisdiction being made. In any event, it is not for this Board but rather for the arbitrator to decide whether the arbitrator has jurisdiction.

Further, as can be seen in section 65(2), the arbitrator, after referring a question to the Board, can conclude the arbitration, that is, render a final decision, without

affecting the Board's jurisdiction to determine the question referred to the Board. *A fortiori*, if the arbitrator were to decide he or she had no jurisdiction after making a referral to the Board, the Board would remain properly seized of the question previously referred to it. Thus, the Board concludes it has jurisdiction to determine the question referred to it.

## V

### THE WORK OF FIRST-LINE SUPERVISORS

In 1993, on a Friday afternoon, TMSs concluded their work at Bruce A and B and were replaced the following Monday morning by UTSSs to supervise the MMs who had been supervised the previous week by TMSs, while performing the same functions at the same worksite. According to the Society, these jobs which are clearly supervisory were "marched out of the Society's scope clause." The PWU's position is that UTSSs were simply reclaiming their traditional functions at the Bruce stations. UTSSs had historically performed the work of first-line supervisors of MMs at the Bruce stations which moreover, the PWU maintains, is the job of a "working supervisor". The PWU argues that UTSSs are not doing TMSs' work nor doing it in TMS fashion. Instead, UTSSs are hands-on, working supervisors who perform a function akin to that of a lead hand.

In cases involving disputed work jurisdiction, the focus of the Board's inquiry is necessarily the nature of the functions performed. Accordingly, we now turn to the examination of the nature of the work performed by the first-line supervisors of MMs at the Bruce stations.

The crews of MMs to be supervised ordinarily consist of 8 to 10 tradespersons who maintain and repair equipment. The crews vary in size and may comprise as many as 16 to 20 tradespersons. Generally, first-line supervision comprises supervision of the field work of the crews, planning and allocation of work, as well as safety-related

tasks. There are bundles of tasks within each of these areas which together make up the first-line supervisory function. Thus, for example in the area of safety, these include reporting on accidents and safety deficiencies, attending monthly meetings on safety with the crews, initiating corrective action upon discovery of work hazards, identifying specific tasks-related hazards to subordinates, discussing safety issues with immediate superiors, identifying work practices and safety equipment to be used, and maintaining current safety training for the crews.

The Society, in its submissions (exhibit 2), provides the following uncontradicted general description of the tasks involved in the first-line supervision of the work of MMs.

With respect to work assignments, first-line supervisors,

*"...receive work packages from the Planning Department indicating what needs to be done. The packages will contain a copy of deficiency report, and specify what 'protection' or 'isolation' is required (i.e., what needs to be shut down before the job can be done). The package may or may not contain procedures, a job safety analysis, or a specific plan detailing the steps in doing a job; it may contain guidelines or information as to how many people are required to do a job and how long it should take them. More detailed information is provided for 'outages' i.e., where something major is shut down; detailed plans are made up in advance to minimize outage time."*

*"...assign the jobs in work packages to men on the crews. Where the work packages do not provide guidelines as to the number of mechanical maintainers required to do a job, the first-line supervisor must make that determination. Even where such guidelines are provided," trade foremen "may decide that more or fewer MMs are required to do the job." The first-line supervisor "must decide which MMs should be assigned to a particular job. They select MMs to work on a given job based on the qualifications and experience of the MMs. They determine qualifications on the basis of the MMs personnel file, and make judgements on experience and ability based on their own experience with their crews. From the standpoint of the second-line supervisor, the shift maintenance supervisor (SMS), it is part of the job of a first-line supervisor to*



*know the expertise of crew members and make personnel choices for work assignments. It is extremely rare for a SMS to overrule a foreman's choice of personnel."*

*"Although job priorities are set by a plan from the Planning Department, which is put out every day, first-line supervisors usually have some flexibility with prioritizing lower priority items. Usually with a 10 person crew, some crew members will be on low priority work which allows the foreman some discretion in prioritizing and when circumstances require a departure from the plan (a "break plan"), the TMS may decide what low priority tasks to drop in order to deal with work not on the plan."*

As to day-to-day supervision,

*"...TMSs and UTSS give MMs a pre-job briefing to identify hazards and point out standards and the level of quality assurance required. The first-line supervisor usually visits each job a couple of times a day, to check that proper procedures are being followed, especially with respect to safety, and that standards are being met. ..."*

*"...TMSs and UTSS are responsible for the enforcement, to some extent the development of policies, plans, work rules, and production and safety standards."*

(pages 4-5 and 6)

The responsibilities of first-line supervisors also include the enforcement of production standards - responsibilities in respect of the quality and quantity of work - identification of training needs and in some instances, communication and coordination with other first-line supervisors.

In his "will-say", Mr. Larry Alderdice, a mechanical maintainer, who while employed at Bruce B has worked for a number of different UTSS for sustained periods, provided the following description of the duties performed by UTSS in supervising the work of MMs.

*"Such supervision would entail such things as: the quality of work, the quantity of work, providing on the job training (including actually showing a mechanical maintainer how to do a particular job), following Hydro work procedures, taking work protection directions, following safety rules, co-ordinating work groups and types of work, assigning planning specific work, co-ordinating work functions, co-ordinating paper work that gives the necessary authority to the mechanical maintainers to do the work (i.e. ensuring that certain people have the required licences and papers to do a particular piece of work), certifying work reports, etc.) maintaining maintenance logs, reporting to the SMS, facilitating procurement of tools and materials, plans and manuals required to do the particular work, conducting pre-job and post-job briefings, performing job safety analysis, providing input into Station work procedures, interpreting and applying (but not enforcing) the collective agreement, explaining to mechanical maintainers Hydro's general work methodologies, and attending planning meetings."*

The Hydro document entitled "Bruce B/Maintenance Administrative Procedures" provides a breakdown of the tasks of UTSs and TMSs and in many cases, as for example in respect of the "quality" and "quantity" of the work, as referred to by Mr. Alderdice, the tasks are similar for all foremen. Indeed, the functions of first-line supervisors in that document, be it UTSs or TMSs, generally include similar tasks in the above four categories.

The report entitled "Review of First-Line Supervisory Positions in Nuclear Power Plants" prepared for the Atomic Energy Control Board in October 1995 (the AECL Report) bears out the similarity in the functions of first-line union and management supervisors. The report examines the discharge of first-line supervisory duties at three separate nuclear power plants; Pt. Lepreau, Pickering "A" and Bruce "B". It states that union and management supervisors are "primarily involved in supervisory tasks related to the technical and safety aspects of the direction of work". While taking into account some differences at the various facilities, it considers the relative amount of time spent on particular functions for both first-line union as well as management supervisors by reference to the same functional areas. While the time spent differs somewhat between the two groups, the principal functions are the same: supervising

field work, planning, assigning work, administering and authorizing work, organizing work packages, designing and delivering trades and technical courses, reporting on work status, managing tools and materials, work procedures, safety, etc. Moreover, within those responsibilities, the core tasks for the two classes of foremen are largely the same.

### **Distinguishing the Duties and Responsibilities of UTSs and TMSs**

In addition to the evidence of Mr. Larry Alderdice who, as stated above, is a mechanical maintainer, the Board received the "will-says" and heard the evidence of Messrs. Doug Ethelston and William Forbes, both shift maintenance supervisors (SMSs) or second-line supervisors. The SMS is a bargaining unit position represented by the Society. Mr. Ethelston, an SMS since 1995, who supervises UTSs was a TMS-3 from 1990 to 1994 and had himself been a mechanical maintainer. While working as an MM he was supervised both by UTSs and TMSs. Mr. Forbes has been an SMS since 1984. Prior to that, he was a TMS-3. Indeed, he was "stepped up" to a UTS-2 following which he became a TMS-3 and continued to supervise the same crew. In his capacity of second-line supervisor, he has supervised both UTSs and TMSs.

We also heard the testimony of Messrs. Terry Hunt and Allan Topping, both mechanical maintainer coordinators, which are not bargaining unit positions. Mr. Hunt had been promoted to UTS and later SMS, while a mechanical maintainer, Mr. Topping had worked for both UTSs and TMSs.

According to the evidence of the witnesses, including Mr. Alderdice, the "supervisory" duties and responsibilities of TMSs and UTSs are largely the same. Mr. Alderdice conceded that TMSs do most of what is described above in his "will-say" as being the supervisory functions of a UTS. He did point out that he did not know how much on-the-job training the TMS does, this being a function which he views as an important aspect of a UTS's work.

What then are the boundaries of these functions? What are the distinctions between UTSs and TMSs in the field? There is no doubt that there are some differences in duties and the way they are performed by TMSs and UTSs. Generally, there are two salient differences on which a good deal of the evidence focused and most especially on the latter more substantive distinction. The first difference is that UTSs do not perform formal disciplinary functions and other personnel-related functions. The second and most critical difference is that in accordance with the provisions of their collective agreement, UTSs are permitted to perform bargaining unit work while TMSs are not. Management foremen may not "pick up the tools" except for training and emergencies. This distinction is conceded by Hydro, which describes that the responsibilities of union and management foremen as being "the same with the exception that the union foremen are permitted to perform the work of the trade" (see "Trades Responsibilities and Supervisory Criteria": Explanatory notes).

Having regard to disciplinary or personnel-related responsibilities, the Society acknowledges that in addition to the supervisory responsibilities described above, TMSs have the following supervisory duties or authority:

- \* scheduling and time-keeping
- \* monitoring hours and absences
- \* monitoring sick leave and following up on the use of sick leave
- \* approving and coordinating vacation schedules
- \* making effective recommendations to SMSs regarding overtime
- \* interpreting the collective agreement and dealing with grievances
- \* recommending trades progression
- \* completing performance, promotion and other appraisals
- \* recommending promotion, demotion or transfers to SMSs
- \* dealing with discipline matters
- \* keeping files on MMs containing confidential material and
- \* accessing confidential "901" files on employees kept by Hydro.

Indeed, TMSs may formally discipline crew members and make disciplinary recommendations while UTSs may not. TMSs may make effective recommendations regarding hiring, promotion, demotion, and transfers while UTSs may not. TMSs



may hire and fire temporary staff in accordance with the collective agreement and policy while UTSs may not.

In contrast to UTSs, TMSs may enforce the collective agreement. Having said that, Hydro points out that UTSs administer provisions of the PWU collective agreement in non-disciplinary matters, such as, for example, those pertaining to hours of work, shift change notices, safety rules and fitness for duty. They may provide input in performance appraisals and provide verbal clarification and input with respect to disciplinary matters.

Moreover, Hydro in the "Bruce B/Maintenance Administrative Procedures" sets out the following responsibilities of UTSs in respect of the management of their crews:

- \* "hold[s] individuals accountable for performance of maintenance work and activities to complete assigned tasks with high standard of performance and achieve results"
- \* monitor[s] "work performance of individual journeypersons in terms of quality and quantity through field and shop observations of maintenance activities," "recognize[s] good work performance and take[s] corrective action to achieve the desired performance", "report[s] continuing occurrences of unsatisfactory performance to the supervisor with suggested methods for improvement,"
- \* ensure rotation of developmental personnel to difference trades activities with simultaneous provision of necessary instruction, and reports the appraisal of the individual's work performance to the immediate supervisor,
- \* recommend developmental personnel progression based on field performance.

(pages 29-30)

Mr. Hunt, who was a UTS and a PWU union steward prior to his promotion to SMS, confirmed that he resigned as union steward because his supervision entailed certain disciplinary aspects. Although he was not required to do so, Mr. Hunt resigned his

position because the conflict made him "uncomfortable". The 15 MMs who worked for him were also the persons he represented as union steward.

While UTSs may not formally discipline, Mr. Hunt points out that from the perspective of a second-line supervisor, UTSs are the first line of defence, to be relied upon in such matters as, for example, in reporting someone unsafe for work. They can moreover advise and do have input in SMS's decision regarding discipline and progression through the ranks.

Mr. Ethelston, while acknowledging the TMS's authority to formally discipline, for example, by way of written reprimand, points out that UTSs have an informal role in that regard, which is relied upon. Thus, while he as an SMS makes the decision to step up an MM to a UTS, it is the UTS who has the greatest input into that decision. Similarly, it is UTSs who in effect recommend approval or denial of vacation requests.

The PWU argues that there is a significant difference in the UTSs' approach to the supervision of crews due not only to the limitations in the PWU's collective agreement, but also to the fact that UTSs are "coaches" and not "cops". The coaching involves more hands-on work as well as working more closely with an individual crew member. Mr. Forbes agrees that if a "cop" is needed, it will be a TMS or SMS. He pointed out however that the culture had changed for all supervisors. The new supervisory model for all supervisors is that of "coach" and there were similar expectations of TMSs and SMSs in that regard.

Having said that, the evidence indicates that there are in fact very few incidents of discipline at the Bruce stations and performance appraisals are not currently being performed at either Bruce A or B. According to Mr. Forbes, there are seldom disciplinary issues, and then almost nothing past a first-level warning. Mr. Ethelston estimated that TMSs spend roughly 20% of their time on disciplinary matters or attending to personnel management functions. The AECL Report confirms that

management supervisors spend more time dealing with the technical and operational aspects of the job rather than with the "people management side". In the three functions of "evaluating", "counselling" and "disciplining" people, it indicates a total of 15% time spent for management supervisors and 5% for union supervisors.

We now turn to the second and major distinction between the two groups. The PWU, in distinguishing its members from those of the Society in the performance of first-line supervisory duties, relies principally upon the fact that while TMSs are precluded from picking up the tools or performing bargaining unit work other than for training and emergencies, UTSs may and in fact do so as part of their duties and responsibilities.

Mr. Alderdice estimated that UTSs spend approximately 20 to 25% of their time doing "mechanical maintainers' duties", which represents bargaining unit work, including working with tools or "wrench time" as well as other MM duties such as job planning, securing necessary approvals, and maintenance assessment. The latter principally consists of planning the parts needed for the job and includes assessing whether there is a need to remove insulation, to disconnect scaffolding and so on.

We heard a good deal of debate and evidence regarding the amount of hands-on work which is in fact performed by UTSs. The Society and Hydro estimate that UTSs work with tools "less than 1% of the time" with perhaps two additional percentage points in direct support of working with tools. Hydro points out that UTSs at the Bruce stations do not often wear "browns" or clothing necessary to do physical work. It also relies on the verification of "Dose Records", which reveal radiation exposure incurred in the performance of physical work and indicate no greater exposure in UTSs than in SMSs in contrast to "working" tradespersons such as mechanical maintainers.

Messrs. Hunt and Topping, Ethelston and Forbes testified that, in their experience UTSs spend little or no time working with tools or doing hands-on work. Such

activity was characterized as occasional and uncommon. There was some agreement with the 1 to 3% estimate of time spent by UTSs working with tools. It is also clear that there are UTSs such as for example Messrs. Karl Rody, Ross Robinson and Ray Thaw who, in the ordinary course of their duties as UTSs perform more extensive hands-on work in situations that do not involve training and emergencies. The evidence however is that these are exceptions rather than the norm.

In response to Mr. Alderdice's estimate of 20 to 25% of time spent by UTSs doing mechanical maintainers duties, Hydro in its written submissions acknowledges that UTSs have in fact performed all of an MM's duties at some point in their career given that most UTSs were at one time mechanical maintainers. Hydro is unclear however as to what is meant by "mechanical maintainers duties" for the estimated 17 to 22% that does not involve working with tools. Hydro and the Society point out for example that non-tool functions such as planning are also performed by TMSs in the course of their duties. Mr. Topping points out that the UTSs perform a higher degree of support work or work in support of the crew generally, but that TMSs also perform support functions. Indeed, the evidence which the Board heard did not fully clarify the nature and composition of the non-tool, bargaining unit work included by Mr. Alderdice in his estimate, nor did it establish the extent to which the roughly 17 to 22% represents time spent in doing bargaining unit work which is not also carried out by TMSs in the performance of their responsibilities. Indeed none of the witnesses of whom the question was asked could agree that UTSs spend as much as 20 to 25% of their time performing mechanical maintainers work or work proscribed to TMSs. Hydro did agree with Mr. Alderdice that UTSs typically spend 75% to 80% of their time engaged in "pure supervisory activity" much like TMSs.

Mr. Ethelston points out that the UTS's job has evolved as have all the functions. It has become a more intensively administrative job requiring the production of more written reports. While he has occasionally seen UTSs do hands-on work, in his experience, UTSs spend most of their time organizing men, supervising work and doing administrative tasks.



## VI

### APPLICANT'S POSITION

In light of the Board's power to resolve jurisdictional disputes by interpreting the relevant certificates and collective agreements and by determining which union has jurisdiction over the disputed work functions, the Society seeks a declaration from the Board that first-line supervisors of mechanical maintainers at the Bruce stations are within the jurisdiction of the Society as defined by its certificate and collective agreement.

The Society submits that the core work functions in question unquestionably constitute supervisory work and *prima facie* fall within the scope of the Society's certificate. In the Society's submission, the Board would have so declared had it directed its mind to the issue at the time of certification. While the issue was not before the Board at that time, now it is squarely called upon to decide the application of that certificate, which in the Society's view encompasses the real first-line supervisors represented by the Society. Similarly, the Society's agreement with Hydro clearly contemplates that the disputed work functions would normally fall within the Society's jurisdiction. PWU's agreement, on the contrary, is not focused on supervisory and professional employees and, even if it were, the PWU cannot supplant, by voluntary recognition or private arrangement, the authority of the Board to determine the appropriate bargaining units in the federal jurisdiction.

The Society maintains that in exercising its jurisdiction under section 65(1), the Board should have recourse to its power of review under section 18, which entails the review and clarification of the original certificate and the bargaining rights granted thereby in the determination of the appropriate bargaining unit. The Society further submits that while the Code permits the certification of supervisors, the Board's concerns for potential conflicts of interest has ordinarily placed the supervisors in their own bargaining unit. The supervision of MMs is therefore properly allocated to the

Society's bargaining unit in order to avoid the inevitable conflicts of interest which arise when supervisors are in the same unit as those they are supervising.

## VII

### RESPONDENT'S POSITION

With the exception of its preliminary objection, decided above, the PWU takes no issue with the Board's jurisdiction under section 65 to entertain the present application. The PWU argues that it has represented working foremen or "working supervisors" since "time immemorial". The distinction between these working supervisors and the supervisors represented by the Society is clearly set out in the collective agreement wherein the parties have contemplated that a UTS is a working supervisor because, unlike the TMS, a UTS may pick up tools as a matter of course. It does not matter how much time a working supervisor spends with tools, what matters is the ability, as set out in the collective agreement, to pick them up.

The PWU has always taken the position that first-line supervision of mechanical maintainers should be by UTS employees and Society-represented employees should be confined to truly managerial functions. By and large, this has been the case with some exceptions. The PWU argues that however, when the Society's TMS classification is used to provide first-line supervision of mechanical maintainers, it does not fairly come within the jurisdictional criteria for managerial functions as set out in PWU's own scope clause. Mechanical maintainers are skilled technical employees, first-line supervision of them would rarely or never involve the traditional managerial functions such as determining staffing needs, hiring and discipline, acting on behalf of management or making decisions about a person's terms of employment. This is in conformity with the historical practice of the parties and supported by the evidence of what the TMSs and UTSs actually do at present, that is to say, TMSs may exercise more supervisory authority than UTSs and do not pick up tools except in an emergency, whereas UTSs do so as a matter of course. This, the PWU argues, is the

distinction that the parties have lived with throughout and should the Board favour the Society's argument, it would thus overturn the long-standing practice of the parties.

The Society was only recognized under the OLRA in 1991 and certified by this Board in 1994. The original recognition clause and then the certificate and the new recognition clause refer to "supervisors". Nothing refers to "working". The Society's jurisdiction was always dependent on the prior question of whether an employee was properly excluded from the PWU scope clause, which has remained basically unchanged since 1973. Thus, since the Society's certificate specifically exempts employees in bargaining units for which any trade union holds bargaining rights, the PWU argues that the certification of the Society should have no effect on the jurisdictional dispute.

In the submission of the PWU, the Board's powers under sections 65 and 18 are limited with respect to the PWU unit because the Board has no control over the appropriateness of a voluntarily recognized unit. There is no overlap between the collective agreement's working supervisor and the certificate's pure supervisor. Where there is no overlap in the functions, the Board must define the term "working supervisor" in its historical and actual context and decide to which union the duties or work functions of the incumbents belong. In the submission of the PWU, no one has argued that the "UTSs are TMSs in UTS clothing". The term "working supervisor" is thus, in the PWU's submission, equivalent to what the parties have agreed is the work of the UTS classification.

The PWU submits, finally, that the Society is asking the Board to give them this classification and to encroach upon the bargaining rights of the PWU. The Board should exercise caution before extending in this manner the jurisdiction of the certified union so as to cover employees who are already covered by a collective agreement. Thus, for those "anomalous situations" in which management foremen are being used, the PWU invites the Board to declare either that the TMS foremen are not within the scope of the Society's bargaining unit, but rather fall within the PWU bargaining unit,

or that in the alternative, that the work of first-line supervision be assigned to PWU-represented UTS employees.

## VIII

### EMPLOYER'S POSITION

Hydro concedes that the inconsistent use of UTS 2's and TMS 3's as first-line supervisors of mechanical supervisors across Hydro is an organizational problem and created various committees, for example Organizing for Ownership Design Team in July 1992, and the NOB UTS-TMS Resolution Committee aka NUTRC, to deal with this and other overall organizational restructuring problem. In January 1994, Hydro suspended the process for filling UTS-2 positions pending the outcome of the Society's jurisdictional grievance of September 15, 1993 over the transfer of TMS work to UTS positions at Bruce A and B.

Hydro takes the position that the Board has authority to interpret the scope clauses of the relevant collective agreements as well as the certificate issued by the Board to the Society, and to deal with the Society's referral notwithstanding that PWU has not been certified by the Board. The employer agrees with the Society that there is now a serious labour relations concern that reaches beyond the particular facts of the grievance in issue. It submits that the Board has jurisdiction under section 65 to give direction to the parties as requested by the Society and asks the Board to exercise that discretion.

## IX

### THE BOARD'S JURISDICTION PURSUANT TO SECTION 65

This section applies when an arbitrator or party to an arbitration refers a question concerning the existence of a collective agreement or the persons bound by a



collective agreement to the Board. In the case of a work jurisdiction dispute such as the present case, the arbitrator seized of a grievance pursuant to a collective agreement may not determine the matter with absolute finality since a conflicting arbitral award may arise from the competing collective agreement. In that respect, these are issues that the Board has the advantage of being able to decide with finality. Indeed the jurisprudence establishes beyond question that this section - and specifically the phrase "identification of the ... employees bound by a collective agreement" - gives the Board the jurisdiction to resolve inter-union disputes over work jurisdiction (Eastern Provincial Airways (1963) Limited (1978), 30 di 82; and [1978] 2 Can LRBR 572 (partial report) (CLRB no. 142), Northern-Loram Joint Venture (1985), 59 di 180; and 9 CLRBR (NS) 218 (CLRB no. 498); and Canadian Pacific (unreported judgment of the B.C. Court of Appeal dated June 19, 1984, Court file No. CA 001 759)). Save for the preliminary objection, the Board's jurisdiction to resolve the present dispute is, in any case, not contested by the parties.

The Board's approach to these matters is quite straightforward. The Board interprets the scope clauses contained in the collective agreements in light of the actual duties which are in dispute and decides which collective agreement applies. If there is overlap between the two, the Board must decide which agreement will prevail.

The general nature of the Board's inquiry was succinctly set out in Eastern Provincial Airways (1963) Limited, *supra*:

*"We are invited to examine what it is that certain employees actually do. Then having ascertained what it is that those employees do, we inquire whether they are covered by the provisions of a collective agreement."*

(page 87)

Once the Board has identified what the employees actually do, it compares these duties to the scope clause of the collective agreement. Where a union is certified and

the scope clause corresponds to the unit description in the Board's certificate, the Board assesses the intended scope of the certificate.

Thus, in Bell Canada (1982), 50 di 105 (CLRB no. 393), the Board first discussed how it would proceed in the "identification of the parties or employees bound by a collective agreement" in the context of a jurisdictional dispute between unions:

*"Can the Board derive authority from this part of the section, which refers to the identification of employees bound by a collective agreement, to settle a conflict of jurisdiction between rival unions? No one is arguing here that the craft and technical employees are not covered by the C.W.C agreement, or that the clerical employees are not covered by the C.T.E.A. agreement, so that it might be claimed that the Board cannot settle the present dispute by deriving authority from the words "identification of the parties or employees bound by a collective agreement". The meaning of this expression is not so simple, however. In fact, the identification of the employees bound by a collective agreement can only be established by referring to the functions or classifications mentioned in the certificate. This certificate establishes the representativeness of the certified association and this representational authority is based on abstract categories of employees, categories derived from their occupation. "*

(page 114; emphasis added)

And the Board concluded:

*"Consequently, the solution to any jurisdictional conflict over the employer's assignment of a particular function to members of one of two unions lies in the interpretation of the certificates, which only the Board has the power to do, with a view to determining the functions that each of the unions is authorized to represent. This process makes it clear which of the two unions represents the function at issue, and at the same time, identifies the incumbents of that function, as well as the collective agreement by which they are bound. Thus by exercising its power to interpret the certificates that it has issued, and that it alone is authorized to do under section 119 of the Code, the Board can identify the employees bound by a collective agreement. In the instant case, the Board is thus acting*

*under sections 119, 121 and 158(1) of the Code. After studying the intended scope of the certification issued to the C.W.C. on May 28, 1976, the Board must now determine whether the assignment function, by its nature and evolution through the years, belonged to job categories that the Board intended to include in the unit represented by the C.W.C."*

(pages 118-119; emphasis added)

Where the disputed positions are fully or partially covered by a voluntary recognition agreement, the Board relies on the parties' intention, as established by the evidence to interpret the scope clause of the collective agreement (Northern-Loram Joint Venture, supra; and Bell Canada, supra).

Whether the Board relies on the intended scope of the bargaining certificate or the presumed intention of the parties to a voluntary collective agreement, the Board admits evidence of past and present practice. Past practice is relevant insofar as it may help the Board to determine the intended scope of a certificate or the intention of the parties to a collective agreement. The parties may not, however, acquire bargaining rights which are not within their unit by the simple fact that bargaining unit members perform or have performed the work in the past (Montreal Port Corporation (1986), 68 di 109 (CLRB no. 606); and British Columbia Telephone Company (1979), 38 di 14; and [1979] 3 Can LRBR 350 (CLRB no. 206)). It is clear, moreover, that amending the job description may mean that the positions and incumbents may move from one bargaining unit to another (Bell Canada, supra; and Société Radio-Canada February 5, 1990 (LD 778)). The essential focus of the Board's inquiry must therefore be to evaluate the current duties or functions of disputed employees and to compare them to the intended scope of the certificate or collective agreement.

Where there is at least one validly certified bargaining unit which is a party to the litigation, the Board compares the scope of the collective agreement with the intended scope of the bargaining certificate pursuant to section 18. The Board first analyzes the scope of the jurisdiction of the applicant union, whose collective agreement is before

the arbitrator. If the disputed work is outside the scope of this agreement, it is unnecessary to proceed further. On the other hand, if the Board finds that it is covered by this agreement and another bargaining agent professes to have rights over the same work, the Board must also interpret the scope clause of the other bargaining agent. Where the Board finds that the scope of the collective agreement of the other bargaining agent other does not cover the disputed work, the matter is concluded in favour of the applicant union (Eastern Provincial Airways (1963) Limited, *supra*; and Northern-Loram Joint Venture, *supra*).

Where, however, the Board finds that the work is also covered by the collective agreement of another union, there is a conflict between the collective agreements and the Board must determine which agreement will prevail (Eastern Provincial Airways (1963) Limited, *supra*, Northern-Loram Joint Venture, *supra*).

Finally, where circumstances warrant, the Board may initiate at the request of the parties or *proprio motu*, a review of the employer's bargaining units in order to resolve any problems with the structure of the bargaining units which may subsist. It should be noted, however, that any revision of the intended scope of the bargaining units will not have any retroactive effect and, therefore, will not serve to resolve the question the arbitrator has asked the Board to resolve (Bell Canada (1981), 43 di 86; and [1982] 3 Can LRBR 113 (CLRB no. 300); and Northern-Loram Joint Venture, *supra*).

## X

### DECISION

If the Board's approach to these matters is straightforward, the definition of work function or of duties is often more problematic in its application. It is well established that the individual employees are not personally bound by a collective agreement but rather are bound by virtue of the functions they perform (Bell Canada (393), *supra*).



What binds employees to one collective agreement or another are the duties which the employee carries out, and the Board's inquiry in the context of work jurisdiction disputes necessarily focuses on the analysis of these duties in light of the intended scope of the recognition clause or bargaining certificate.

An employee's duties can only be defined in relation to the structure and operation of the business. The employer, subject to any restrictions it may have agreed to in the collective agreement, has the right to create positions and define their work content. It may likewise change the structure of its business and the manner in which it operates and, in the process, change the work content of different positions or classifications (Bell Canada (393), *supra*; and Société Radio-Canada, *supra*).

The Board's mandate is only to interpret the bargaining certificate and the scope clause of the collective agreement. If a work assignment is not in conformity with another provision of the collective agreement, this is for the arbitrator to decide. The Board, for its part, must presume that the employer has the right to assign work to incumbents of a given position in the manner in which, according to the evidence, it has assigned it. Having said that, the fact that two or more different bargaining units perform the specified work does not mean that there are two types of work being assigned and does not change the nature of what the employees actually do. While the Board's determination will ultimately identify the employees who are to perform the functions covered by a collective agreement the determination to be made is as to the true nature of the work. It is made without reference to the titles or identity of the persons employed in the performance the job at issue, but having regard instead to the characteristics of the function.

Where an employer assigns work which is on the borderline of union jurisdiction, and the assigned work does not clearly fall in one unit or the other, in order to make a determination, the Board must endeavour to separate, in light of the intended scope of the recognition clause or bargaining certificate, the core functions of a position from its secondary characteristics (Cape Breton Development Corporation (1986), 67

di 203 (CLRB no. 595)). The Board will not readily divide the position up between bargaining agents. The Code does not contemplate that an employee may be split between bargaining units and therefore, the Board will not further break down its analysis of the work being performed. Where an employee's duties are, for example, part clerical and part technical, the Board must determine in which unit the employee's position is to fall; it cannot be both. As the Board pointed out in Société Radio-Canada, *supra*, to adopt the solution according to which an employee would pass from one unit to the other and back again in the course of a given day would engender chaos or would force, most inefficiently, the employer to create positions when it has not judged it expedient to do so. Such is not the Board's mandate.

Within this context, let us now examine some of the conclusions to be drawn from the evidence regarding the nature of the duties and responsibilities entailed in the first-line supervision of mechanical maintainers the essential features of which will either resemble the job category that the Board intended to include in the unit represented by the Society, namely that of "supervisor", or fit with the "working supervisor" within the PWU's jurisdiction.

In the first instance, whether it is performed by a UTS or a TMS, the evidence demonstrates that first-line supervision is largely uniform and coextensive in respect of the supervision and management of the work of mechanical maintainers in that it encompasses for the most part similar duties and obligations. In fact, SMSs of whom the question was asked, responded unambivalently that it made no difference to them to have either UTSs or TMSs supervise crews of MMs. Moreover, from their perspective, they did not perceive marked difference in the performance of the supervisory functions in the field by the two classifications of foremen. There are some perceived differences as to the relative value of one category of foreman over the other. TMS for example are more likely to accept responsibility for larger crews and are more flexible in that regard. Similarly, one SMS conceded the fact that UTSs can or will pick up the tools may provide greater flexibility to a maintenance supervisor. However, in essence, the two classifications were viewed as doing very

similar if not the same job and more importantly no preference was evinced for one classification over the other by any of the SMS or mechanical maintenance coordinators who provided evidence to the Board.

According to the evidence of the Society and Hydro regarding disciplinary and personnel matters, UTSs refuse to perform such functions as being managerial functions and properly performed by TMSs. The Society takes the position that this is not simply due to the restrictions which are found in the PWU collective agreement but also understandable given the conflict of interest between UTSs and the mechanical maintainers they supervise.

The evidence indicates that discipline is not a significant issue at the Bruce stations and that personnel-related responsibilities are not significantly time-consuming for TMSs. By the same token, it is clear that human resources management issues are by no means absent from the functions and responsibilities of UTSs. The evidence establishes that UTSs do in fact have an informal role in such matters, and that their advice and input is sought and relied upon. If UTSs do not perform the full gamut of the "supervisory" duties carried out by TMSs, in this regard it is certainly in large part due to the restrictions in their collective agreement.

What of the PWU's submission to the effect that UTSs spend 20-25% of their time doing bargaining unit work? According to the evidence before the Board, UTSs do not spend 20 to 25% of their time doing hands-on work or bargaining unit work. They infrequently pick up tools to do hands-on work and the amount of time devoted to such activity directly including work in support of hands-on work is estimated on average, to be at the most 3%. The remaining 17 to 22% includes an indistinct mélange of planning, report writing, and work in support of the crew generally. The Board heard conflicting evidence in this regard, which moreover could not sustain a conclusion that these various tasks represented bargaining unit work or work which is not also carried out by TMSs in connection with their supervisory duties.

In contrast with full-time UTs who are permanent first-line supervisors, there are MMs who are stepped up to act as UTs on a temporary basis who, in the performance of their duties, are in fact, hands-on supervisors akin to lead hands. There is a long-standing practice of stepping up MMs to UTs on a temporary basis. In the circumstances of emergencies, stringent time limits, or where extra support is needed, they may be called upon to work with the tools and perform the work of the crew. These are, in our view, genuine "working supervisors" within the meaning of the scope clause of the PWU collective agreement, consistent with the meaning attributed to it in the submissions of the PWU. Indeed, the first-line supervision of MMs may historically have evolved from the practice of stepping up MMs where the circumstances warranted it. The first-line supervision of maintainers has however evolved, as indeed have all of the functions.

The distinctions as to what the UTs and TMs "may" and "may not" do are clear and acknowledged by the parties. Witnesses consistently identified two: UTs may pick up tools and may not formally discipline. The evidence regarding the nature of the duties of first-line supervisors indicates that these are artificial distinctions arising out of the limitations placed on the two classifications by their respective collective agreements. In the circumstances of this case, the fact that there are restrictions, pursuant to a collective agreement on the work which may be performed by bargaining unit members is at best indirect evidence of the actual nature of the work they perform. Moreover, these differences do not go to the essence of what the functions entail in the field, namely oversight and responsibility for the performance of the work performed by MMs.

The functions and responsibilities of first-line supervisors at the Bruce stations and indeed, as would appear, at the Hydro nuclear facilities generally, are at core and in essence supervisory. The primary function and occupation of the first-line supervisor is supervision. The core job functions of first-line supervisors are clear and well established: assigning manpower, planning, coordinating work groups and functions, overseeing and directing work, holding crews responsible for their work in accordance



with set standards. These duties may include communicating directly with other supervisors, and call for some measure of independent decision making. This constitutes the principal, habitual, ongoing work of the first-line supervisor and is genuinely supervisory in nature.

It is moreover clear that the use and importance of first-line supervisors to the employer resides in their responsibility and accountability as supervisors, and not as individuals either doing or capable of doing bargaining unit work. Mr. Forbes points out that a UTS who ordinarily performs hands-on work along with his crew members is in fact problematic as this creates a dependency and renders the person in question indispensable as a tradesperson. Mr. Hunt was more emphatic: "I want my supervisors supervising".

As the performance or the ability to perform tradesperson's work in the ordinary course, is neither significant, desirable nor essential, the primary or essential functions of a first-line supervisor cannot be said to be those of a "working supervisor". In this respect, there is no conflict between the two collective agreements. Indeed, we cannot agree with the PWU's submission, which in effect concludes that first-line supervision is a UTS's work because UTSs perform it. By the same token, we have not relied on the Society's argument that the functions are supervisory because they were at one time performed by TMSs. The work is supervisory by virtue of the nature of its core functions and responsibilities.

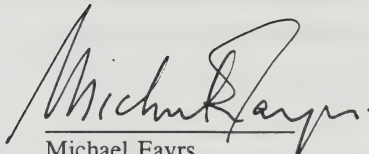
In the present case, for the reasons stated, the Board concludes that the nature of the work of the first-line supervisors of MMs is, at its core, supervisory work which is covered by the intended scope of the Society's bargaining certificate. It is not the work of the "working supervisor" or lead hand which falls within the PWU's jurisdiction according to the terms of the PWU collective agreement.

Accordingly, the Board declares that first-line supervisors of mechanical maintainers at Bruce A and B are "supervisors" within the meaning and scope of the Society's

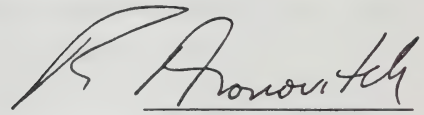
certificate and are bound by the Society's collective agreement. This matter is returned to arbitrator Brown for disposition in accordance with our determination.



J. Philippe Morneault  
Vice-Chair



Michael Eayrs  
Member



Roza Aronovitch  
Member

# information

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## Summary

Uli Henssler et al., *applicants*, Rogers Cablesystems Limited (Vancouver Division), *employer*, and Local Union No. 213 of the International Brotherhood of Electrical Workers, *bargaining agent*.

Board File: 565-529  
CLRB/CCRT Decision no. 1211  
October 17, 1997

## Résumé

Uli Henssler et autres, *requérants*, Rogers Cablesystems Limited (Vancouver Division), *employeur*, et la section locale 213 de la Fraternité internationale des ouvriers en électricité, *agent négociateur*.

Dossier du Conseil: 565-529  
CLRB/CCRT Décision n° 1211  
le 17 octobre 1997

This case concerns a request for partial decertification filed pursuant to section 38 of the Canada Labour Code (Part I - Industrial Relations) by a group of employees who had been varied into an existing bargaining unit in 1996. Alternatively, the applicants have presented an application for review pursuant to section 18 of the Code requesting that the bargaining unit be amended by varying their department out of the certification order.

Following an analysis of the provisions of the Code regarding the revocation of a union's certification, the Board concludes that sections 38 and following do not provide for the revocation of part of a bargaining unit.

Il s'agit d'une demande de révocation partielle faite en vertu de l'article 38 du Code canadien du travail (Partie I - Relations du travail) présentée par un groupe d'employés. Ces employés ont été ajoutés en 1996 à une unité de négociation existante par ordonnance du Conseil. Les requérants ont également présenté, aux termes de l'article 18 du Code, une demande de réexamen en vue de faire modifier l'unité de négociation. Ils demandent au Conseil que leur département soit exclu de l'ordonnance d'accréditation.

Ayant analysé les dispositions du Code concernant la révocation de l'accréditation d'un syndicat, le Conseil conclut que les articles 38 et suivants ne prévoient pas la révocation partielle de l'accréditation d'une unité de négociation.

The applicants who comprise only a small portion of the certified bargaining unit are precluded from requesting the revocation of the amended certification order as it applies to them. Their application for revocation is therefore dismissed.

As for the application for review, the Board considers that the existing unit remains appropriate for collective bargaining and finds no justification to vary the bargaining unit so as to exclude the applicants.

Les requérants, qui constituent une minorité d'employés de l'unité de négociation accréditée, ne peuvent demander la révocation de l'ordonnance d'accréditation modifiée qui s'applique à eux. Leur demande de révocation est donc rejetée.

Quant à la demande de réexamen, le Conseil estime que l'unité existante demeure habile à négocier collectivement et ne voit aucune raison de modifier l'unité de négociation pour en exclure les requérants.

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## Reasons for decision

Uli Henssler et al.,

*applicants,*

*and*

Rogers Cablesystems Limited  
(Vancouver Division),

*employer,*

*and*

Local Union No. 213 of the  
International Brotherhood of  
Electrical Workers,

*bargaining agent.*

Board File: 565-529  
CLRB/CCRT Decision no. 1211  
October 17, 1997

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The Board was composed of Ms. Suzanne Handman, Vice-Chair, and Mr. Michael Eayrs and Ms. Roza Aronovitch, Members.

### Appearances:

Mr. Adam S. Albright, for the applicants; and

Mr. Peter R. Sheen, for the employer; and

Mr. Ron Dickson, Assistant Business Manager, Legal Affairs, for the respondent union.

These reasons for decision were written by Ms. Suzanne Handman, Vice-Chair.

## I

The present case concerns a request for partial decertification under the provisions of the Canada Labour Code (Part I - Industrial Relations).

On February 11, 1997, the Board received an application for revocation pursuant to section 38 of the Code from a number of employees of Rogers Cablesystems Limited (Vancouver Division) ("Rogers"). In this application, the employees in question request that the Board revoke the bargaining rights of Local Union No. 213 of the International Brotherhood of Electrical Workers (the "IBEW" or the "Union"), with respect to part of the bargaining unit, thereby excluding those employees working in the company's Home Terminal Device Repair Department ("HTDR Department"). Alternatively, as set out in the amended application, the employees are requesting a partial decertification of their bargaining unit pursuant to the Board's powers of review under section 18 of the Code. The background of this file is set out below.

## II

The Board, by an order dated May 1, 1974, as amended on February 2, 1979 and February 2, 1980, certified the IBEW as bargaining agent for the following unit:

*"all employees ... classified as foreman, technician, apprentice technician, installer, truck driver, program operator, pay T.V. technician, warehouseman - construction and maintenance."*

On September 19, 1995, the IBEW applied to vary its certification order inter alia to include eleven employees of Rogers working in the HTDR Department. On March 22, 1996, the Board - having concluded that the proposed unit was appropriate for collective bargaining and having determined that there was majority support on the part of both the employees sought by the Union to be added to its original unit as well as those employees in the proposed unit - granted the application, thereby adding the

employees of the HTDR Department to the existing bargaining unit (see Rogers Cablesystems Limited (Vancouver Division), March 22, 1996 (LD 1527)).

The unit now covers:

*"all employees of Rogers Cablesystems Limited (Vancouver Division), Vancouver, B.C., classified as foreman, technician, apprentice technician, installer, truck driver, pay T.V. technician, warehouseman - construction and maintenance, and employees of the Home Terminal Device Repair department classified as quality control repairer, tester and cleaner and inventory clerk."*

(emphasis added)

It is these added employees who are seeking the termination of IBEW's bargaining rights in respect of the HTDR Department.

### III

The employees, in their revocation application, refer to the March 22, 1996 order as one certifying the Union for the HTDR Department.

The Union disputes the applicants' contention that the unit they wish to decertify is, in fact, a bargaining unit, maintaining that the HTDR Department is only a subgroup comprising a small part of the certified unit. Section 38 of the Code, it argues, does not provide for decertification of part of a bargaining unit. The Union also maintains that the applicants who form less than 5% of the total bargaining unit do not represent the majority of workers. Other arguments presented by the Union include improper employer influence, its lay-off of union supporters, and the employer's inflexible position at the bargaining table in negotiating provisions governing the newly added subgroup.

The employer denies it has promoted the application for decertification and disputes the other arguments raised by the Union. In particular, it claims the Union has never filed an unfair labour practice complaint concerning the lay-offs nor has it filed a complaint alleging that the company has failed to negotiate in good faith.

#### IV

Section 38 and following of the Code provide for the revocation of certification. Section 38 reads as follows:

*"38.(1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union."*

In its consideration of such applications, the Board will first ascertain that certain requirements have been met, namely that the application has been made in a timely manner, by an employee of the bargaining unit, free of employer influence (see Jean-Claude Harrison et al. (1983), 53 di 85; and 4 CLRBR (NS) 258 (CLRB no. 417); and William E. Blonski (1984), 56 di 222; 8 CLRBR (NS) 111; and 84 CLLC 16,054 (CLRB no. 476)). Furthermore, where a collective agreement has not yet been negotiated, the bargaining agent enjoys the protection granted by section 39(2) of the Code; its certification will not be revoked unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement (see Donald Nosworthy (1981), 45 di 153 (CLRB no. 330); and Jean-Claude Harrison et al., supra). When the above-mentioned conditions exist, the Board will revoke a union's certificate pursuant to section 39(1) if it is satisfied that the majority of employees in the bargaining unit no longer wish to be represented by the bargaining agent.



The present application, however, raises a new consideration. The question before us is whether a majority of employees in part of a bargaining unit can request and obtain the cancellation of the bargaining certificate which applies only to that particular group or that part of the unit.

The various provisions of the Code regarding the cancellation of a union's certification all refer to "the bargaining unit". For example, section 38(1) provides that the application must be made by an employee in "the bargaining unit". By virtue of section 39(1), where the Board is satisfied that the conditions have been met and that a majority of the employees in "the bargaining unit" no longer wish to have the bargaining agent represent them, the Board shall - subject to the restrictions provided for in section 39(2) - revoke the trade union's certification as bargaining agent for "the bargaining unit".

A "bargaining unit" as defined by section 3 of the Code is:

*"... a unit*

*(a) determined by the Board to be appropriate for collective bargaining, or*

*(b) to which a collective agreement applies."*

And a "unit", according to the same section, means "a group of two or more employees."

Consequently, the term "bargaining unit" contained in sections 38 and following of the Code refers either to a group of employees who are voluntarily recognized or, as in the present case, to the group of employees the Board has determined to be appropriate - that is, the unit of employees described in the certification order or any amendment thereto. It is a majority of employees of such a group which may apply for decertification and, if granted, the existing certification order for the unit as a

whole is revoked. Employees, constituting a majority in a portion of a bargaining unit, cannot apply for or obtain the revocation of part of the unit. Sections 38 ff. of the Code do not provide for partial decertifications.

In the present instance, the group of employees determined by the Board to be appropriate for collective bargaining consists of all Rogers employees who are included in the amended bargaining unit description:

*"all employees... classified as foreman, technician, apprentice technician, installer, truck driver, pay T.V. technician, warehouseman - construction and maintenance, and employees of the Home Terminal Device Repair department classified as quality control repairer, tester and cleaner and inventory clerk."*

It is this entire group which constitutes the certified bargaining unit. The applicants who work in the HTDR Department do not form a separate unit and, as such, they are precluded from requesting the revocation of the amended certification order as it applies to them.

Accordingly, the application for revocation is dismissed.

V

Alternatively, the applicants have applied for a partial decertification pursuant to section 18 of the Code, requesting that the bargaining unit be amended by varying the HTDR Department out of the certification order. They seek to be excluded on the ground they no longer wish to be part of the unit. They also claim it is no longer appropriate for them to be included in that unit as they are engaged in entirely different activities from those of the rest of the bargaining unit and do not share the

same community of interest. In addition, they state that the Union and the company have been unable to agree to terms and conditions which would govern their employment although bargaining has taken place on nine occasions.

The Code confers on the Board responsibility and broad discretionary powers to determine the unit that is appropriate for collective bargaining. In so doing, the Board is not bound by the unit proposed in an application nor by any suggestions made. It must determine, based upon well-established criteria, the unit it considers appropriate (see Canada Post Corporation (1990), 81 di 187; and 14 CLRB (2d) 195 (CLRB no. 818); and International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd., [1996] 2 S.C.R. 432). As the Supreme Court held at page 449, this determination "falls squarely within the exclusive jurisdiction of the Board".

The Supreme Court further held:

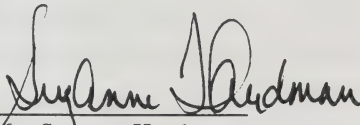
*"In summary, the legislation imposes a mandatory duty upon the Board to determine whether the proposed bargaining unit is appropriate. That decision requires the Board to exercise its skills and expert knowledge in the field of labour relations. The decision must be reached in the context of the factual situation presented to the Board and not in the abstract. It is a decision that is uniquely appropriate for a labour board to make. ..."*

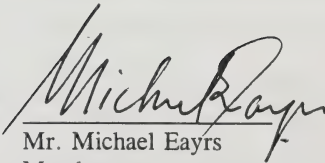
(pages 450-451)

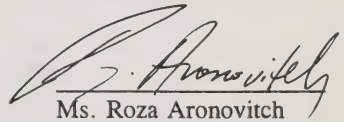
In the context of the present case, the Board - fully cognizant of the functions performed by the employees of the HTDR Department and those of the work-force covered by the Union's certification - considered it appropriate to add these employees to the existing bargaining unit. That decision was rendered in March 1996 and the parties are currently in negotiations.

The Board has reviewed all the grounds raised by the applicants in support of their application. Leaving aside the question of whether the applicants have standing to bring an application for review, the Board has concluded that the application is without merit. Nothing in the evidence convinces us that the community of interest has changed since our 1996 decision nor that the other grounds invoked justify varying the unit. The Board is of the view that the existing bargaining unit remains appropriate for collective bargaining.

The application for review is therefore dismissed.

  
Ms. Suzanne Handman  
Vice-Chair

  
Mr. Michael Eayrs  
Member

  
Ms. Roza Aronovitch  
Member











